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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

RAILROAD COMMISSION OF TEXAS, et al.,
Petitioners,

vs.

MISSOURI PACIFIC RAILROAD, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit's holding permits private agreements to override governmental regulation of a safety issue.

2. Whether the Federal Railroad Administration (FRA), under the circumstances presented, has found cabooses not to be a safety issue, and impliedly preempted state regulation of cabooses.

3. Whether implied preemption is permissible under 45 U.S.C. § 434, in that the explicit language of § 434 allows states to adopt rail safety regulations "until such time as the Secretary has *adopted* a rule, regulation, order or standard covering the subject matter of such state requirement .... " (Emphasis added).

LIST OF ALL PARTIES

The following parties appeared in the proceedings before the court of appeals:

Missouri Pacific Railroad Company
Southern Pacific Transportation Company
The Atchison, Topeka and Santa Fe Railway Company
Burlington Northern Railroad Company
Missouri-Kansas-Texas Railroad Company
St. Louis-Southwestern Railway Company
Kansas City Southern Railway Company
Louisiana and Arkansas Railway Company

Railroad Commission of Texas and its members
James E. Nugent
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OPINIONS BELOW

The opinion of the court of appeals (Appendix A) is reported at 850 F.2d 264 (1988). The opinion of the United States District Court for the Western District of Texas, Austin Division (Appendix B) is reported at 671 F. Supp.466 (W.D. Tex. 1987)

JURISDICTION

The judgment of the court of appeals was entered on July 29, 1988. No motion for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent provision of the Federal Railroad Safety Act of 1970, 45 U.S.C. § 434 is set forth at Appendix G. The Commission's regulation 16 Tex. Admin. Code § 5.622 is set forth in Appendix C.

STATEMENT OF THE CASE

The railroads brought this action against the Commission seeking to enjoin and invalidate a rail safety regulation promulgated by the Commission requiring cabooses on certain long trains. The railroads complained in the trial court that the state rule (1) was preempted by federal laws and regulations, (2) constituted an unconstitutional burden on interstate commerce, (3) was an unlawful exercise of power by the Commission, and (4) was arbitrary, capricious, and not supported by substantial evidence. The railroads moved for preliminary injunction on the ground of preemption. The Commission's motion to consolidate the

hearing on preliminary injunction with the trial on the merits was granted after the hearing on preliminary injunction. The trial court, by Memorandum Opinion and Order, (App. B) entered its final judgment on various grounds of preemption by federal law and regulation without deciding the burden on commerce claim, unlawful excerise claim, and the arbitrary, capricious and substantial evidence claims. The Commission brought its appeal to the Fifth Circuit pursuant to 28 U.S.C. § 1291. The United States Court of Appeals for the Fifth Circuit affirmed the trial court on the ground that the state's general rule requiring cabooses was impliedly preempted. This was evidenced, the Court said, by certain FRA statements made in a rulemaking proceeding concerning rear-end telemetry devices. 850 F.2d at 267.

STATEMENT OF FACTS

In the summer of 1986, the Commission in two separate dockets promulgated a series of railway safety regulations in response to the 1985 enactment by the Texas Legislature of TEX. REV. CIV. STAT ANN. art. 6448a (Vernon Sup. 1987) which provides:

> The Railroad Commission of Texas is hereby authorized to perform any act and issue any rules or orders as permitted by the Federal Railroad Safety Act of 1970 (45 U.S.C. § 431, *et seq.*).

The first set of rules (16 TEX. ADMIN. CODE §§ 5.616-5.620) which required certain filings, safety equipment, safe walkway areas, and prohibited visual obstructions at grade crossings, was challenged by these same railroads on the same grounds asserted herein in the same lower court. The trial court found all those state rules preempted. *Missouri Pacific Railroad Company v. Railroad Commission of Texas*, 653 F. Supp. 617 (W.D. Tex. 1987). That decision

was reversed and remanded in part, reversed and rendered in part, and affirmed in part at 833 F.2d 570 (5th Cir. 1988) ("MOPAC I'). That same trial court likewise in this case found the Commission's caboose rule wholly preempted.

The caboose rule (App. C), enacted in the Commission's second docket, is divided into 6 subparts, (a)-(f), which are summarized as follows:

1. Sub-part (a) consists of two long sentences. The first sentence requires manned cabooses generally on freight trains in Texas. The second sentence defines or qualifies the applicability of the exceptions in sub-part (d) which permit cabooseless operation on long trains outside railyards.

2. Sub-part (b) requires cabooses to be equipped with an operable radio system which will enable two-way communication between the caboose and the head of the train.

3. Sub-part (c) exempts from the caboose requirement trains under 2000 feet and those operating within railyard limits.

4. Sub-part (d) provides a further exemption for even the long trains if six safety conditions are met.

5. Sub-part (e) permits variances from the caboose rule.

6. Sub-part (f) sets the compliance date at six months after effective date of the rule.

The Fifth Circuit has grounded its decision on implied preemption of the general caboose requirement in the first sentence of sub-part (a).

REASONS FOR GRANTING THE PETITION

I.

THE COURT'S HOLDING RELEGATES REGULATION OF A SAFETY ISSUE TO A PRIVATE AGREEMENT

The Fifth Circuit's opinion permits a private agreement, in the form of collective bargaining, to override governmental regulation of a safety issue. The national impact of this decision is that all state caboose regulation is precluded and superceded by private agreements. Though the court attempts to avoid this conclusion on two slender reeds of reasoning, it cannot.

First, the court finds implied preemption of the state rule based on a statement of the FRA in a proceeding relating to rear-end devices, not cabooses. Second, the court adopts the FRA's open-ended statement that "the lack of a caboose is not a safety issue *per se*" (App. A at 7a, emphasis added) as a finding that the lack of a caboose is *never* a safety issue. Neither reed of reasoning withstands the harsh wind of scrutiny.

A. THE FRA STATEMENT DOES NOT IMPLIEDLY PREEMPT A STATE CABOOSE REQUIREMENT

The FRA consideration cited by the lower court is a 1986 amendment of the FRA's power brake rules to allow a mechanical telemetry device as an alternative to visual observation in brake tests. 51 Fed. Reg. 17300-301 (1986) (App. F). Although several comments received during this FRA rulemaking proceeding concerned the presence or absence of a caboose, a caboose requirement was never

under consideration. Instead, the FRA there recognized that "nothing in any current FRA regulation requires a caboose on any train, nor does anything in the final rule issued in this docket authorize the removal of a caboose." *Id.* at 17300.

The lower court's holding makes the consideration of comments concerning cabooses tantamount to federal action covering the subject matter of the challenged Railroad Commission requirement. This result contradicts the plain meaning of 45 U.S.C. § 434 and misapplies *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978). The FRA did not refuse to adopt a caboose rule. No such proposal was before the FRA.

Even if the FRA consideration of comments is conceived to be a pronouncement on the advisability of caboose requirements, there would not have been sufficient federal action to preempt states from adopting caboose rules. While this honorable Court in *Ray* found that a federal agency's failure to adopt a regulation can preempt state regulation, this finding depends upon the particular statute involved. *Id.* at 178, n.28. Each preemption case "turns on the peculiarities and special features of the federal regulatory scheme in question." *City of Burbank v. Lockheed*, 411 U.S. 624 (1973.)[1] The Federal Railroad Safety Act is quite specific on how the Secretary of Transportation, through the FRA, can preempt state regulation: "A state may adopt any law, rule, regulation, order or standard relating to railroad safety until such time as the Secretary *has adopted* a rule, regulation, order, or standard covering the subject matter of such State requirement." 45 U.S.C. § 434;. (Emphasis added).

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[1]*See also Florida Lime and Avacado Growers v. Paul*, 373 U.S. 132, 147 (1963); for the proposition that preemption must be determined within the context of the involved statutory framework.

This Court has further explained how a federal agency may preempt state regulation in *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 106 S. Ct. 1890 (1986): "the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency." A federal agency "may not confer upon itself power. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress." *Id.* at 1901-02. The FRA can only preempt state regulation by *adopting* a regulation which covers the subject matter of the state regulation. 45 U.S.C. § 434. The FRA's non-adoption of caboose regulations cannot preempt section 5.622. *See Arkansas Electric Co-op v. Arkansas Public Service Commission*, 461 U.S. 375, 385 (1983).

If the FRA intended to preempt state caboose regulation through any of its rulemaking proceedings, it should have said so. "It is appropriate to expect an administrative regulation to declare any intention to preempt state law with some specificity." *California Coastal Commission v. Granite Rock Company*, 480 U.S. 572 (1987), *citing Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 718 (1985). (federal agencies should "make their intentions clear if they intend for their regulations to be exclusive"). Indeed, the FRA itself has clearly and expressly preempted state action in connection with other areas of regulation. For example, concerning alcohol and drug testing, the FRA stated at 50 Fed. Reg. 31569 (1985):

> 11219.13. Preemptive Effect.

> (a) Under section 205 of the Federal Railroad Safety Act of 1970 (45 U.S.C. § 434) issuance of these regulations preempts any state law, rule, regulation, order, or standard covering the same subject matter
> . . . .

No such clear expression of preemption has been made by the FRA concerning cabooses.

The Fifth Circuit relies on the declaration in 45 U.S.C. § 434 that rail safety regulations be nationally uniform to the extent practicable. Section 5.622 simply does not violate the national uniformity concept because no federal regulation covers its subject matter.

Since the Railroad Commission should be held to have authority to adopt a requirement for cabooses on *all* Texas freight trains, the more narrow requirement of 5.622 must certainly be permissible state action under FRSA. Section 5.622 excludes certain train operations from the caboose requirement. First, no train under 2,000 feet in length or operating within railyards is required to have a caboose. Second, a longer train may operate without a caboose so long as none of the named hazardous materials is transported and the train and track are equipped with certain protections. These exclusions are not the subject matter of the rule; the subject matter is, instead, cabooses. The FRSA preemption inquiry should end when it is determined that no federal requirement covers the subject matter of cabooses.

B. The FRA Statement Does Not Preclude Finding That the Use of a Caboose is a Safety Issue

The FRA says, "Moreover, the FRA does not consider the lack of a caboose to be a safety issue per se." (App. F at 70a). Aside from its appearance as an offhand comment in

the background state.. ·:· for an unrelated rule, the literal meaning of the words of the statement is that the lack of a caboose *can be* a safety issue under the proper circumstances. "Per se" means, "by himself or itself; in itself; taken alone; in isolation; unconnected with other matters." *Black's Law Dictionary*, Revised Fourth Edition (1968). The unambiguous meaning of the statement simply does not rise to the level of importance attributed it by the lower court. It is not an unqualified statement that the "FRA ... has determined that the issue does not involve safety." 850 F.2d at 267(App. A, p. 7a)

Here, the Railroad Commission of Texas, in its rulemaking proceeding specifically addressing the issue of cabooses, found that circumstances in Texas make the cabooseless operation of trains particularly hazardous to the public. The Commission was especially concerned because the 1984 statistics before it showed that 22% of the nation's chemical and petroleum product rail tonnage originates in Texas. 11 Tex. Reg. 2974, 2976, June 27, 1986 (App. C at 55a). Hazardous materials accidents in Texas were twice the national average in 1985. *Id.* These materials were being transported in an aging fleet of tank cars which were increasingly privately owned, thus beyond the control of the railroads as to maintenance or rebuilding. *Id.* Based primarily on these concerns, the Commission found a need for the trained eyes and ears of a train crew member in the rear of certain long trains in Texas. The locomotive personnel simply cannot observe the rearward cars of long trains to detect potential problems. The risks to the public were too great for the Commission to permit cabooseless operations for all Texas trains.

The FRA may think that the lack of a caboose is not a safety issue in isolation or unconnected with other matters. But, the Texas agency, after an extensive review of Texas

rail safety concerns, has found that cabooses will promote the public safety in Texas and has chosen to require them in the absence of a federal rule.

C. *Terminal Railroad Association of St. Louis* Rules

The Court of Appeals' reeds of reasoning wither and bend to breaking in the light of this Court's ruling in *Terminal Railroad Association of St. Louis v. Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1943). The lower court's attempt to distinguish the case out of existence must fail. 850 F.2d at 269 n.5 (App. A, p. 9a).

In *Terminal*, this Court flatly upheld a state's right to require cabooses on trains as a function of that state's power to regulate the public health and safety. This holding has never been overturned.[2] The court also found that the caboose requirement did not constitute a burden on interstate commerce even though trains crossed state lines.

It is, however, a third holding of *Terminal* that is the key to the major issue of this case: whether regulation of a safety issue can be relegated to collective bargaining. In *Terminal*, this Court discusses the relationship between labor acts such as the Railway Labor Act and health and safety regulations. 318 U.S. at 6,7. Though sometimes their paths cross, the two types of enactments are directed at very different goals. Labor acts are aimed at promoting the peace and continuity of commerce (318 U.S. at 7) so that management and labor will be able to "cooperate in running the railroad" (*Pennsylvania R. Co. v. United States R. Labor Board*, 261

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[2] *Terminal* is cited with approval as recently as 1985 for the proposition that states have the power to legislate health and safety. *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 758 n.32 (1985).

U.S. 72, 84 (1923)). Such labor acts are not meant to displace the States' regulation of a "great variety of conditions in transportation and industry, such as sanitary facilities and conditions, safety devices and protections, purity of water supply, fire protection, and innumerable others" (318 U.S. 6,7). The Court states:

> [W]e would hardly be expected to hold that the price of the federal effort to protect the peace and continuity of commerce has been to strike down the state sanitary codes, health regulations, factory inspections, and safety provisions for industry and transportation.

318 U.S. 7.

This reasoning, that collective bargaining should not displace safety standards, is also reflected in the Congressional intent in enactment of the FRSA. Vermont's Senator Winston Prouty, ranking minority member of the Surface Transportation Subcommittee, who had moved to amend an early draft of the bill because "[a]s originally written, the proviso permitting collective bargaining was so broad that it could have undermined the basic goals of this act - " stated:

> Mr. President, I was pleased that the majority of the committee agreed with me and adopted my amendment which encourages collective bargaining for more stringent standards which are not inconsistent with those established by the Secretary of Transportation but at the same time would insure the fact that collective bargaining will not be used as a vehicle for undermining safety standards.

115 Cong. Rec. p. 40205, Dec. 19, 1969. [Emphasis added].

Yet the court below makes no defense of its blatant holding that the matter of cabooses is "affirmatively ... left not to the states but to collective bargaining" (App. A at 7a) beyond its erroneous conclusion that the lack of a caboose is unqualifiedly not a safety issue. Absent this erroneous conclusion, the Court of Appeals' decision must fail.

II.

PREEMPTION UNDER THE FEDERAL RAILROAD SAFETY ACT

The lower court's basic proposition that the Texas rule is impliedly preempted is absolutely contrary to the Congressional history and unambiguous language of the Federal Railroad Safety Act. That act provides, in part, as follows:

> A state may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety *until such time as the secretary has adopted* a rule, regulation, order or standard covering the subject matter of such state requirement. A state may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. § 434. (Emphasis added).

Thus, state laws or rules are only preempted when the federal government has acted with respect to the same subject matter. The FRSA clearly does not occupy the entire

field of railroad safety. *Mopac I;Southern Pacific Transportation Co. v. Public Utilities Comm'n of California*, 647 F. Supp. 1220 (N.D. Cal. 1986), *aff'd* 820 F.2d 1111 (9th Cir. 1987) (*per curiam*); *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1153 (9th Cir. 1983); *Norfolk & Western Railway Co. v. Pennsylvania Public Utility Commission*, 413 A.2d 1037, 1041 (Penn. 1980). Under FRSA § 434, there are two instances in which a state may regulate. First, a state may regulate railroad safety until the Secretary of Transportation adopts a rule, regulation, order or standard covering the subject matter of the state regulation. Second, a state may regulate railroad safety where it is necessary to eliminate or alleviate an essentially local safety hazard. The court below has recognized that the Federal Railroad Safety Act leaves states a role to play in rail safety. *Donelon v. New Orleans Terminal Company*, 474 F.2d 1108, 1113 (5th Cir. 1973).

The Secretary of Transportation has not adopted a rule, regulation, order, or standard covering the subject of § 5.622. Because no federal regulation covers this subject matter, it is not necessary for this Court to determine whether the regulation eliminates or alleviates an essentially local safety hazard.

A. CONGRESSIONAL INTENT

The lower court found that Congress merely intended the States to play a "stopgap role" in rail safety regulation until the federal agency could regulate. (App. A at 8a n.3). The court reasoned that this role has diminished with the passage of time since enactment of the FRSA. *Id.* However, this construction is contrary to the language of the act and the debate when it was enacted. The Federal Railroad Safety Act specifically authorizes state regulation of railroad safety at 45 U.S.C. § 434 set out above. During the Congressional

debate on the Federal Railroad Safety Act, then Secretary of Transportation Volpe explained the areas of permissible state jurisdiction over railroad safety as follows:

> *To avoid a lapse in regulation,* Federal or State, after a Federal Safety bill has been passed, section 105 provides that the *states may adopt or continue in force any law, rule, regulation, or standard relating to railroad safety until the Secretary has promulgated a specific rule, regulation, or standard covering the subject matter* of the state requirement. This prevents the mere enactment of a broad authorizing Federal statute from preempting the field and making void the specific rules and regulations of the states. Therefore, until the Secretary has promulgated his own *specific* rules and regulations in these areas, state requirements will remain in effect. This would be so whether such state requirements were in effect *on or after the date of enactment* of the federal statute. [Emphasis added].

Hearings Before the Subcomm. on Transp. and Aeronautics of the Comm. on Interstate and Foreign Commerce on H.R. 7068, H.R. 11417, and H.R. 14478 (and similar bills) S. 1933, 91st Cong. 2d Sess., Ser. No. 91-51, 29 (1970).[3]

Congress was very concerned that states should maintain an effective role in railroad safety regulation; it certainly did not intend to preempt state regulatory authority. Rep. Jake Pickle explained as follows:

> Contrary to some speculation that this version of the Railroad Safety Act cuts across state jurisdiction, *the States can still take action* in three methods. First, the state can continue *and initiate* legislation in areas of

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[3]Section 105 of the Senate bill and section 205 of the House bill are incorporated into 45 U.S.C. § 434.

> safety not covered by Federal regulations ... as an important adjunct, for the first time, the states are clearly given the *power to initiate* legislation in areas which have not been touched by these [federal] regulations and these state legislative efforts will remain in effect unless and until such time that the Federal Government institutes its own regulations. This is an important advance and recognition of state governments.

116 Cong. Rec. 27613 (August 6, 1970).

While it is true that Congress wanted national uniformity in rail safety to the extent practicable, the explicit authorization of state regulation in 45 U.S.C. § 434 was a counterweighing concern to its desire for national uniformity. *See* House Report No. 91-114, U.S. Code Cong. and Admin. News, 91st Cong. (1970) p. 4116 ("House Report") ("[Section 205] provides, however, that until the secretary acts with respect to a particular subject matter, a state may continue to regulate in that area.") The Senate Report contains a similar recognition of State powers:

> On the other hand, the committee recognizes the state concern for railroad safety. Accordingly, this section preserves from Federal preemption two types of State power. First, the States may continue to regulate with respect to that subject matter which is not covered by rules, regulations, or standards issued by the Secretary. All State requirements will remain in effect until preempted by federal action concerning the same subject matter.

No. 91-619, U.S. Code Cong. and Admin. News. 91st Cong. (1969) p. 809 (hereinafter "Senate Report").

The primary purpose of FRSA is to promote safety in all areas of railroad operations. Congress's paramount concern for safety was the reason it enacted the FRSA. House Report, U.S. Code Cong. and Admin. News, pp. 4105-4108; Senate Report, pp. 1-5. Consequently, Congress did not authorize the Federal Railroad Administration to preempt state railroad safety regulations unless there were federal regulations on the same subject matter of state regulations.

This Court has repeatedly refused to void state statutes or regulations, absent congressional intent to preempt them.

> If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.

New York State Dept. of Social Services v. Dublino, 413 U.S. 405, 413 (1973), quoting *Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952). *See also Pacific Gas & Electric v. Energy Resources Commission*, 461 U.S. 190, 206 (1983). Courts are especially reluctant to strike down state regulations when it would leave citizens unprotected while waiting for federal action. *Hillsborough County, Florida v. Auto. Med. Labs*, 471 U.S. 707 (1985); *Kelly v. Washington* 302 U.S. 1, 14-15 (1937). Any doubts as to whether federal regulation of a particular subject matter is the same as state regulation should be resolved in favor of the states. *Chevron U.S.A., Inc. v. Hammond* 726 F.2d 483, 487-88 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 1686 (1985). Where a state's police power is involved, preemption is not to be presumed. *Chrysler Corp. v. Tofany*, 419 F.2d 499, 511 (2nd Cir. 1969); *Chrysler Corp v. Rhodes*, 416 F.2d 319, 324 n.8 (1st Cir. 1969).

III.

THE LOWER COURT'S STATEMENTS ABOUT THE BURDEN ON INTERSTATE COMMERCE AND THE LBIA ARE ERRONEOUS DICTA

The Court of Appeals' ruling in the case at bar is clearly grounded solely on its finding of implied preemption of the general caboose requirement. Thus, the lower court's findings of a burden on interstate commerce and preemption of the exceptions to the general rule under the Locomotive Boiler Inspection Act ("LBIA"), 45 U.S.C.-§ 22 *et seq.*, are wholly unnecessary to the decision. Nevertheless, these findings are erroneous.

The question of whether the Texas caboose requirement constitutes a burden on interstate commerce was never tried in this case. That issue is not a proper subject of judicial notice in a Court of Appeals. Whether a state regulation constitutes an undue burden on commerce is a fact-bound determination. *See Burlington Northorn Railroad Co. v. State of Nebraska*, 802 F.2d 994 (8th Cir. 1986) (remanded for additional evidence on burden on commerce of Nebraska's caboose rule). This Court found Illinois' caboose requirement was not an undue burden on interstate commerce based on the facts of that case. *Terminal Railroad Association v. Brotherhood of Railroad Trainmen*, 318 U.S. 1, 7-9 (1943). The Railroad Commission should not be bound by a finding that the State's rule is a burden on commerce where the facts have not been fully developed. It is insufficient that the lower court finds it "difficult to imagine a state regulation of the train itself ... which could escape being a burden on commerce ...." (App. A at 9a).

The Court of Appeals analysis of the exceptions to the general caboose requirement is likewise flawed. The court holds that these exemptions "standing alone" are preempted by the LBIA because they relate to locomotives in some way. (App.A at 10a). The exemptions, however, do not stand alone, they qualify a general caboose requirement. As exceptions to a valid general rule, the exemptions are permissible even if they would be preempted standing alone. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 173 (1978). In *Ray*, this Court upheld a provision of a statute requiring a tugboat escort for vessels lacking designated safety features, as follows:

> Given the validity of a general rule prescribing tug escorts for all tankers, Washington is also privileged, insofar as the Supremacy Clause is concerned, to waive the rule for tankers having specified design characteristics.

435 U.S. at 173.

The facts in *Ray* as they relate to tugboat escorts are entirely analogous to those contested in this case. In both *Ray* and this case, an absence of regulation allowed the States to impose their own safety regulations. As an element of those valid regulations, the State did, and was perfectly entitled to, establish the exemptions to those regulations regardless of whether the exemptions standing alone covered previously regulated areas. The lower court committed error in failing to apply this principle.

CONCLUSION

Review by this Court is necessary to correct the Fifth Circuit's erroneous application of implied preemption which permits private agreements to take the place of the state's traditional role in regulating the health, safety, and welfare of its citizens.

Respectfully submitted,

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88-789

NO. _____

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

RAILROAD COMMISSION OF TEXAS, et al.,
Petitioners,

vs.

MISSOURI PACIFIC RAILROAD, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION FOR CERTIORARI

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APPENDIX A

MISSOURI PACIFIC RAILROAD, et al.
Plaintiffs-Appellees

versus

RAILROAD COMMISSION OF TEXAS, et al.
Defendants-Appellants,

No. 87-1466

United States Court of Appeals,
Fifth Circuit.

July 29, 1988

Appealed from the United States District Court for the Western District of Texas.

Before THORNBERRY, WILLIAMS and DAVIS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

Appellees are various railroads suing the Texas Railroad Commission ("Commission") to enjoin enforcement of 16 TEX. ADMIN. CODE § 5.622, which requires a caboose or alternative safety equipment on most trains travelling through Texas. This Court recently addressed related issues in a companion case involving regulation of rail walkways and visibility at grade crossings. *Missouri Pacific Railroad Co. v. Railroad Commission of Texas*, 833 F.2d 570 (5th Cir. 1987) ("MOPAC I"). As with *MOPAC I* , this appeal concerns the preemptive scope

of federal railroad regulations.[1] The district court found Texas § 5.622 completely preempted by three federal statutes: the Locomotive Boiler Inspection Act ("LBIA"), 45 U.S.C. § 22 *et seq.* (1986); and the Hazardous Materials Transportation Act ("HMTA"), 49 U.S.C.App. § 1801 *et seq.* (1976). Declaratory and injunctive relief accordingly was awarded to the railroads. We affirm the district court, but based on the clear application of the FRSA and its preemptive effect on § 5.622.

I.

Cabooses once were essential to train operation. Braking and speed were controlled in the caboose, and from it the crew could observe the movement of the train and check for overheating of the brakes, axles and wheels. Technological advances over the years have greatly diminished the importance of cabooses to safe train operation. Automatic brakes are controlled from the locomotive, advances in wheel bearings decrease the risk of overheating, and monitoring devices simulate rear-car observation. Although manned cabooses may to a de minims degree continue to enhance train safety, railroads in recent years have objected to the costliness of ratining cabooses since this elimination of significant safety considerations. Major railroads in 1982 executed a collective bargaining agreement with railroad labor unions, eliminating cabooses on 25% of all trains.

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[1]The railroads presented additional claims to the district court, including alleged constitutional violations of the commerce clause and the contract clause. The district court chose to address solely the issue of preemption, basing its decision on the "settled practice" of avoiding purely constitutional questions unless necessary to the resolution of a case. *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 735, 98 S.Ct. 3026, 3033, 57 L.Ed.2d 1073 (1978).

In 1986, the Texas Railroad Commission adopted regulation § 5.622, which requires an occupied caboose capable of communicating with the locomotive on all trains carrying certain hazardous materials, and also on trains over 2,000 feet in length which lack certain mechanical devices used to monitor the train and track.[2] The details of these

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[2]Section 5.622 provides as follows:

(a) Except as provided in subsection (c) and (d) of this section, each railroad corporation operating in the state of Texas shall place a caboose occupied by at least one employee on the train crew as the last car on any freight train that is required by the Federal Railroad Administration rules (49 Code of Federal Regulations Part 232) to have its air system and cars inspected by qualified inspecting employees or certified federal inspectors. The exception prescribed in subsection (d) of this section shall not apply to any train in which the consist includes any car containing a load or residue of a hazardous material included in the following Standard Transportation Commodity Code (Western Trunk Line Committee, Agent, Tariff STCC 4902 (Class A explosives); 4902 (Class B explosives); 4904 (non-flammable compressed gases); 4905 (flammable compressed gases); 4906, 4907, 4908 (flammable liquids) 4920 (poisons Class A); 4921 (poisons Class B); and 4930 (corrosive materials).

(c) A caboose is not required on freight trains satisfying either of the following conditions:

(1) a length of 2,000 feet or less; or

(2) operating within a railroad yard or within yard limits as designated pursuant to 49 Code of Federal Regulations § 218.35.

(d) A caboose is not required on freight trains satisfying all of the following conditions:

(1) flag protection against following trains on the same track is not required by 49 Code of Federal Regulations § 218.37;

(2) the track route is equipped with wayside overheated journal and dragging equipment detectors located along such route, at intervals not exceeding 30 miles in distance, which are able to communicate directly to the train's operating crew information related to the safety of that train's operation, including: acknowledgment of the train's presence at the detector, the nature of the defect found, and the location within the train of any defect detected;

(3) the track route is equipped with high-shifted load could cause an unsafe condition when moving through such locations;

(4) there is an operating telemetry device located on the trailing end of the rear-most car capable of communicating the following information to

devices and conditions which may excuse railroad compliance with the caboose requirement are set out in the subsection (d) of the regulation. The district court determined that the FRSA preempted § 5.622 in its entirety. Alternatively, the court found subsections (a), (b), d(2), (4) and (5) preempted by a combination of (1) the FRSA, which addresses flag protection, dragging equipment detectors, and telemetry devices; (2) the LBIA, which covers the subject matter of locomotive equipment, and (3) the HMTA, which deals with the transportation of hazardous materials. *Missouri Pacific Railroad Company v. Railroad Commission of Texas*, 671 F.Supp. 466 (W.D. Tex. 1987). We find we need only analyze and apply the FRSA's preemptive effect upon § 5.622.

II.

Congress enacted the FRSA in 1970 "to promote safety in all areas of railroad operations and to reduce railroad-related accidents ...." 45 U.S.C. § 421 (1986). The Federal Railroad Administration ("FRA'0 enforces the

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the locomotive engineer: motion, brakepipe pressure, and power condition of the transmitting device;

(5) there is a counting device which enables the locomotive engineer to ascertain the length of the train; and

(6) there are no cars containing open top loads which exceed the railway's line clearances, as published annually (National Railway Public Company, *Railway Line Clearances*), placed farther than 2,000 feet behind the controlling locomotive.

(e) Any railroad corporation may apply for a variance from the requirements of this section on a form to be prescribed by the Commission. Such application shall be governed by the rules contained in Chapter 5, Subchapter U of this title (relating to General and Special Rules of Practice and Procedure), as they may be from time to time amended. The Commission may approve such application for good cause shown.

(f) Each railroad corporation shall comply with the provisions of this section no later than six months after the effective date of this section.

FRSA and promulgates railroad safety regulations. The FRSA contains an express preemption provision, which states:

> The Congress declares the laws, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce. 45 U.S.C. § 434 (1986).

Thus, § 434 of the FRSA mandates uniform national railroad safety standards, "to the extent practicable." States are precluded from regulating railroad safety in areas already covered by the Secretary of Transportion, unless the state regulation addresses 'an essentially local safety hazard." The Commission does not attempt to defend § 5.622 by "covering the subject matter" of cabooses on trains.

A determination of federal preemption under the Supremacy Clause begins with inquiry "whether Congress explicitly or implicitly declared that the states are prohibited from regulating" the subject matter of state law. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158, 98 S.Ct. 988, 994, 55 L.Ed.2d 179 (1978). Because no federal law directly addresses cabooses, we are concerned with implied, rather than express, preemption. The law of implied

preemption provides that "'where failure of ... federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such [state] regulation is appropriate or approved pursuant to the policy of the statute,' States are not permitted to use their police power to enact such a regulation." *Ray, supra,* 435 U.S. at 179, 98 S.Ct. at 1004-05 *citing Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 774, 67 S.Ct. 1026, 1030, 91 L.Ed. 1234 (1947).

This Court applied *Ray* in *MOPAC I*, to determine whether the FRSA impliedly preempted Texas' rail walkway requirements. *MOPAC I* set out several general conclusions about the preemptive effect of the FRSA. We held that the FRSA does not evince a total preemptive intent because it specifically preserves a regulatory position for the states. *MOPAC I, supra* at 573. But although *MOPAC I* rejected implied FRA preemption of rail walkways, we must reach the opposite conclusion with respect to cabooses.

The situation before us differs significantly from that in *MOPAC I* . There, this Court determined that the FRA had declined certain rail walkway requirements because the proposed rules were vague or otherwise defective-not because the FRA considered walkway requirements unjustified. *MOPAC I* at 575, *quoting Southern Pacific Transportation Co. v. Public Utilities Comm'n of California*, 647 F.Supp. 1220 (N.D. Cal. 1986). Consequently, we determined in *MOPAC I* that FRA had not impliedly preempted state regulation of rail walkways; rather the FRA appeared to be saying "we haven't looked at walkways yet." *Id.* at 576.

In the instant case, however, the FRA background information accompanying 49 C.F.R. 232, permitting the use of end-of-train telemetry devices as substitutes for visual brake inspection, demonstrates FRA consideration of safety in cabooseless operations. The 1986 FRA background report states: The major objection raised by commenders

opposed to the proposed rule was the opinion that elimination of a caboose from the end of a train adversely affects safety. For example, the comments of the Railway Labor Executive's association and the United Transportation Union called for new requirements, *e.g.*, overheated bearing/wheel detectors, train length restrictions, and dragging equipment detectors, to counteract the perceived safety detriment of cabooseless trains. FRA does not agree with this line of analysis. First *nothing in any current FRA regulation requires a caboose on any train, nor does anything in the final rule issued in this docket authorize the removal of a caboose. The determination on whether a railroad uses a caboose on any given line is made through the collective bargaining process. Moreover, the FRA does not consider the lack of a caboose to be a safety issue per se.* While this final rule may facilitate railroads' obtaining economic benefits from cabooseless operations, it does not in any way determine whether a caboose will or will not be used.

51 Fed. Reg. 17, 300-301 (1986) (emphasis added). We conclude from this background statement that the FRA has fully considered the safety aspect of requiring cabooses and has determined that the issue does not involve safety. It is also clear that the FRA did not intend to leave to the states the matter of requiring cabooses. The FRA has drawn the affirmative conclusion that the use of cabooses is a matter for collective bargaining, not for federal nor state regulation. A finding of implied preemption must follow. *MOPAC I* made clear that implied preemption under *Ray* arises when the policy maker appears to be saying "we haven't done anything because we have determined it is appropriate to do nothing." *Supra,* at 576. The FRA has determined it is appropriate for itself to do nothing about cabooses, and affirmatively has left the matter not to the states but to collective bargaining. Under these circumstances, we are

compelled to conclude that the FRA has impliedly preempted state regulation of cabooses.[3]

We note further that virtually all state regulations affecting the train itself appear preempted by federal law.[4] The LBIA completely preempts the field of locomotive equipment. *Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605, 613, 47 S.Ct. 207, 210, 71 L.Ed. 432 (1926); *MOPAC I, supra*, 833 F.2d at 576 n.7 ("State attempts to prescribe *any* locomotive safety equipment must necessarily

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[3]We acknowledge the Commission's argument that the language of § 434, which explicitly provides a role for state regulation in the absence of corresponding federal law, seems to contradict the notion of implied preemption. Our reading of the legislative history of § 434, however, fails to indicate congressional intent that states be permitted to regulate *any* area of railroad safety for which a FRA rule is lacking. A congressional hearing addressing federal-state relations under the FRSA, states:

> *To avoid a lapse in regulation*, ... the states may adopt or continue in force any law, rule, regulation or standard relating to railroad safety until the Secretary has promulgated a specific rule, regulation, or standard covering the subject matter of the state requirement. This prevents [sic] the mere enactment of a broad authorizing Federal statute from preempting the field. ..."

Railroad Safety and Hazardous Materials Control: Hearings on H.R. 14417, 7068 H.R. 14478, and S. 1933 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 91st Cong., 2d Sess. 51 (1970) (statement of Harley O. Staggers, Chairman Interstate and Foreign Commerce Committee) (emphasis added). We read this statement as indicative of congressional intent that states play an important stopgap role in the safe transition from state to federal regulation of railroads. The FRSA has been in effect eighteen years. If there remain nonlocal matters of railroad safety open for state regulation, they do not include areas in which the FRA has chosen not to act. Here, we stress again, the FRA has determined that the use of cabooses is not a safety concern.

[4]To this generalization we find only few and minor exceptions, such as this Court's recent decision upholding the requirement of fire extinguishers and first aid kits on cabooses. *MOPAC I, supra*, at 576. *See also Baltimore and Ohio R.R. Co. v. Oberly*, 837 F.2d 108 (3d Cir. 1988) (state noise control regulation affecting railroad facility not preempted by Federal Noise Control Act).

fail."); and the FRA has regulated most aspects of train safety. Moreover, it is difficult to imagine a state regulation of the train itself, as opposed to the right of way, which could escape being a burden upon commerce under Article I, Section 8, Clause 3 of the United States Constitution.

But whether there exists some obscure train safety issues which have yet to be faced by the FRA need not deter us here. We find significant guidance by noting the substantial burden on commerce created by a state caboose requirement. The nature of such a burden was discussed over 40 years ago in the leading case of *Southern Pacific Co. v. Arizona,* 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945). The case involved the application of a state law limiting the length of trains. Even though the Court recognized some safety element in limiting the length of trains, that safety element was found to be outweighed by the burden upon commence created from state laws limiting the length of trains. The Court stressed that the Arizona train limit law required trains whose length exceeded Arizona's limits to either stop at the Arizona border and be broken up, or to comply with the Arizona law in adjoining states as well. *Id.* 325 U.S. at 775; 65 S.Ct. at 1623.

A similar effect results from the Texas caboose requirement. Freight trains entering the state would be required to stop and add a caboose unless the railroad has complied with the six detailed requirements of Commission Regulation § 5.622(d). *See* fn.2, *supra.* The alternative to halting the train at the border of the state to add a caboose would, of course, require the railroad to carry a caboose in states where it was not required to do so, thus extending the Texas law as a burden upon commerce in those other states.[5]. This same consideration was found to be of great

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[5]We distinguish the situation before us from that of *Terminal Railroad Ass'n. v. Brotherhood of Railroad Trainmen,* 318 U.S. 1, 63 S.Ct. 420, 87 L.Ed. 571 (1943), in which the Supreme Court held that a state caboose regulation did not create an unconstitutional burden on commerce. The *Terminal Railroad*

significance in *Southern Pacific Co. v. Arizona,* where it was shown that the Arizona train limit statute, as a practical matter, was controlling the length of trains all the way from Los Angeles, California to El Paso, Texas. *Supra,* 325 U.S. at 775; 65 S.Ct. at 1523. The burden upon commerce element, upon balance, is even more manifest in this case because we have a federal government determination that safety considerations are not involved in the requirement that freight trains be equipped with cabooses. *See* FRA Background Comments, 51 Fed. Reg. 17, 300-301 (1986) ("the FRA does not consider the lack of a caboose to be a safety issue per se.") We point out that we apply the burden on commerce analysis in this case not to make a constitutional decision but to emphasize the need for preemption; that is, we find valid federal preemption in part by emphasizing the burden on commerce created by the state regulations.

One final consideration must be stated. The railroads under the regulation can gain exemption from the caboose requirement by meeting the six detailed demands of the regulation mentioned immediately above, provided the trains are not transporting hazardous materials. The caboose requirement may or may not have been intended as an indirect means of requiring the railroads to install loads detectors and overheating detectors along the tracks, as well as telemetry devices capable of communicating with the locomotive engineer. But it makes no difference. Standing on their own, these devices clearly are not subject to to state regulation because of federal preemption . Most of the detectors and devices would require installations within the

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decision was not a preemption case. There was no related exercise of federal authority which could be found to be in conflict with the state law. *Supra* , 318 U.S. at 3, 7, 63 S.Ct. at 421-23. Further, the case was based upon safety considerations as of 46 years ago, before much of the development of modern safety devices and equipment.

locomotive for reception and monitoring purposes. *See Missouri Pacific Railroad Co. v. Railroad Comm'n of Texas, supra,* 671 F.Supp. at 474-75. Yet there is nothing clearer in the law than the fact that the locomotives themselves are subject to no regulations, requirements, or additions to equipment at all. *Napier, supra,* 272 U.S. at 613, 47 S.Ct. at 210; *MOPAC I, supra,* at 576 n.7. Thus, the alternative to the caboose requirement given to the railroads by the regulation is barred by the wall of express preemption.

We conclude that Texas' regulation requiring cabooses on trains is preempted by the FRSA through its enforcing body the FRA. Accordingly, § 5.622 is invalid. The decision of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

NO. A-86-CA-569

MISSOURI PACIFIC RAILROAD COMPANY
ET AL.

versus

RAILROAD COMMISSION OF TEXAS, ET AL.

AMENDED MEMORANDUM OPINION AND ORDER

Pursuant to Rule 60(a), the Court hereby amends its Memorandum Opinion and Order of May 8, 1987, and substitutes this corrected version.

Before the Court is the Plaintiff's Complaint for Declaratory and Injunctive Relief. The Court, having considered all of the briefs and evidence filed in this case, enters the following Memorandum Opinion.

I. BACKGROUND

On June 16, 1986, the Railroad Commission of Texas (RRC) adopted a rule requiring a caboose on most trains operating in Texas. The rule is codified at 16 TEX. ADMIN. CODE § 5.622. The rule had an effective date of July 7, 1986, and a compliance date of January 7, 1987. The Plaintiffs filed this action on October 17, 1986, and

moved for a Temporary Restraining Order on January 5, 1987. On January 6, 1987, the Court, finding that the Plaintiff railroads ("Railroads") were likely to succeed on the merits of their preemption claims, granted the TRO. The Railroads then filed a Motion for Preliminary Injunction, which came on for hearing before this Court on January 20, 1987. At the hearing, the parties submitted extensive testimony in affidavit form, and presented detailed legal arguments. At the close of the hearing, the Court made an oral ruling that the Railroads were entitled to the injunction.

Before the hearing began, the RRC made an oral motion to consolidate the hearing on the preliminary injunction with the trial on the merits, pursuant to FED. R. CIV. P. 65(a)(2). The court directed the RRC to reduce that motion to writing and file it with the Clerk. The RRC has done so, and although the Railroads initially opposed the motion, they have since stated that they have no objection to such a consolidation. Thus, this matter is now before the Court for a final judgment. As noted, the hearing on the Railroads' Motion for Preliminary Injunction addressed only the preemption arguments. The Railroads have also stated claims for relief based upon arguments that the rule violates the commerce and contract clauses of the Constitution, that adoption of the rule was an *ultra vires* act by the RRC, and that the rule was an arbitrary and capricious act by the RRC. In keeping with the "settled practice" of not reaching constitutional issues unless necessary to resolve the case, *see F.C.C. v. Pacifica Foundation,* 438 U.S. 726, 735 (1978), the Court will not address the constitutional challenges to the rule. The Court also declines to rule on whether the RRC acted arbitrarily or capriciously in enacting the rule, or whether the act was *ultra vires*. Rather, the Court will address only the preemption arguments made by the Railroads, as those arguments are disposition of the case.

II. JURISDICTION

As noted, this is an action for a declaratory judgment that the rule at issue is preempted by federal law, and for a permanent injunction enjoining enforcement of the rule. The RRC has made several arguments disputing the Court's jurisdiction over this matter. Those arguments are: (1) the Railroads lack standing to assert the interests of the federal government; (2) no case or controversy exists; (3) the case is not ripe; and (4) no federal question jurisdiction exists. The Court has examined these identical arguments, made in identical form, in another case. *Missouri Pacific Railroad Company, et al. v. Railroad Commission of Texas, et al.*, No. A-86-CA-406 (W.D. Tex. Jan. 27, 1987) (*MOPAC I*). In the Court's order granting summary judgment in that case, the Court found that all the arguments were without merit. Rather, than restate what has already been said elsewhere, the Court will incorporate into this opinion that part of the order granting summary judgment in *MOPAC I*, which relates to jurisdiction. The arguments made in this case, identical to those made in *MOPAC I*, have no more merit here than they did there, and will be rejected for the reasons stated in *MOPAC I*. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 2201 and 28 U.S.C. § 1331.

III. PREEMPTION

The Railroads have articulated several bases for a finding that section 5.622 is preempted by federal law. They argue that the rule is preempted by the Locomotive Boiler Inspection Act (LBIA), 45 U.S.C. § 22 *et seq.* (1986); the Federal Railroad Safety Act (FRSA), 45 U.S.C. § 421 *et seq.*, (1986); and the Hazardous Materials Transportation Act (HMTA), 49 U.S.C. § 1801 *et seq.* (1976).

The Supremacy Clause, U.S. CONST. art. VI, cl. 2, nullifies state laws that "interfere with or are contrary to"

federal law. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 105 S.CT. 2371, 2375 (1985) (*quoting Gibbins v. Ogden*, 9 Wheat 1, 211 (1824) (Marshall, C.J.)); *Rollins Environmental Services, Inc. v. Parish of St. James*, 775 F.2d 627, 634 (5th Cir. 1985). Congress is authorized to absolutely preempt state and local rulemaking authority in a particular field. *Pacific Gas & Electric Co. v. State Energy Resources Comm'n*, 461 U.S. 190, 203-04 (1983); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

Even where Congress has not entirely displaced state and local rulemaking in a specific area, those lower laws are preempted to the extent that they conflict with federal law. Where a lower law 'stands as an obstacle to the accomplishments and execution of the full purposes and objectives of Congress,' *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), it is preempted.

Rollins, 775 F.2d 634. Congressional intent to preempt state law in a given area may be inferred from the existence of a comprehensive scheme of federal regulation. *Hillsborough*, 105 S.Ct. at 2375. Preemption is also inferred when the area of law is one in which "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice v. Santa Fe Elevator Corp*, 331 U.S. 218, 230 (1947). Finally, state laws can be preempted by federal regulation as well as by federal statute. *Hillsborough*, 105 S.Ct. at 2375 (*citing Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699, 104 S.Ct. 2694, 2700 (1984)).

A. The LBIA

Although the LBIA does not contain an express preemption provision, the Supreme Court has held that the

LBIA wholly preempts the subject matter of locomotive equipment. *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605, 613 (1926). This rule was recently affirmed in *Consolidated Rail Corp. v. Pennsylvania Public Utility Commission*, 536 F.Supp. 653, 656-57 (E.D. Pa. 1982), *aff'd. mem.*, 696 F.2d 981 (3d. Cir. 1982), *aff'd. mem*, 461 U.S. 912 (1983). The rule, as stated in *Napier* is that:

> state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of authority conferred upon the Commission leads to that conclusion. Because the standard set by the Commission must prevail, requirements by the states are precluded, however commendable or however different their purpose.

Napier, 272 U.S. at 613.

B. The FRSA

The FRSA contains an express preemption provision:

> The Congress declares that laws, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A state may adopt or continue in force any law, rule, regulation, order or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such state requirement. A state may adopt or continue in force an additional more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and

> when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. § 434 (1986). Thus, when the Secretary of Transportation promulgates rules or regulations that cover rail safety, a state may adopt or continue in force similar laws, rules or regulations only

> 1) when necessary to eliminate or reduce an essentially local safety hazard, and
>
> 2) when not incompatible with any federal provision, and
>
> 3) when not creating an undue burden on interstate commerce.

E.g., Donelon v. New Orleans Terminal Co., 474 F.2d 1108, 1112 (5th Cir.), *cert denied,* 414 U.S. 855 (1973). If a state's rules or regulations covering a federally-addressed rail safety issue are to survive preemption, the state must establish each of the elements of this narrow exception. *Id., National Ass'n of Regulatory Utilities Commissioners v. Coleman*, 542 F.2d 11, 13 (3rd Cir. 1976).

Obviously, a key inquiry in this case is to what extent the FRSA, or any other act concerning rail safety,[1] has covered the subject matter of section 5.622. This determination turns on the definition of "covering the subject matter", a key phrase contained in section 434. Although the

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[1] Section 434 refers to acts by "the Secretary", referring to the Secretary of Transportation, and does not confine itself to acts pursuant to the FRSA. Thus, an act by the Secretary pursuant to, for example, the HMTA could preempt state law under the terms of section 434.

phrase is not defined in the statute, an analysis of the Congressional intent in enacting section 434 sheds light on the meaning of the phrase.

> [The rail industry] has a truly interstate character calling for a uniform body of regulation and enforcement. It is a national system .... The integral operating parts of these companies cross many state lines. In addition to the obvious areas of rolling stock and employees, such elements as operating rules, signal systems, power supply systems, and communication systems of a single company normally cross numerous state lines. To subject a carrier to enforcement before a number of different state administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.

H.R. REP. NO. 1194, 91ST Cong., 2d Sess., *reprinted in* 1970 U.S. CODE CONGR. & AD. NEWS 4104, 4410-11. Thus, it is clear that Congress intended to establish uniform national rail safety standards. Courts that have considered the phrase in the entire context of section 434, have read it as a narrow exception to a broad preemption of state regulation in rail safety matters. *National Ass'n of Regulatory Utilities Commissioners v. Coleman,* 542 F.2d 11, 13 (2d Cir. 1976); *Donelon v. New Orleans Terminal Co.*474 F.2d 1108 (5th Cir. 1973); *Consolidated Rail Corp. v. Pennsylvania Public Utility Comm'n*, 536 F.Supp. 653, 657 (E.D. Penn. 1982); *Atchison, Topeka & Santa Fe Railway Co.*, 453 F. Supp. 920, 926 (N.D. Ill. 1977). In short, the statute evinces a total preemptive intent in rail safety matters, with very limited exceptions.

As noted, if federal regulations address a rail safety matter, states may regulate in that area only when all three prongs of the preemption test established in 45 U.S.C. §

434 are satisfied. The language of the statute clearly demonstrates that all three groups must be established or the state regulation will be preempted. 45 U.S.C. § 434; *see Donelon* , 474 F.2d at 1112. Congressional intent regarding the first prong, local hazards, is clear from the House Reports on the 1970 Railroad Safety Act:

> The purpose of this latter provision is to enable the states to respond to local situations not capable of being adequately encompassed within uniform national standards. The states will retain authority to regulate individual local problems or reduce essentially local railroad safety hazards. Since these local hazards *would not be statewide in character,* there is no intent to permit a state to establish statewide standards superimposed on national standards covering the same subject matter.

H.R. REP. NO. 1194, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 4101, 4117.

Courts that have addressed the issue have consistently held that the first prong of the test does not authorize imposition of statewide standards. *E.g., Coleman,* 542 F.2d at 14-15 (state accident reporting requirements, largely duplicative of similar federal requirements, preempted due to statewide impact); *Consolidated Rail Corp.,* 536 F. Supp. at 658 (regulation that required speed recorders preempted because it had statewide impact); *Atchison, Topeka & Santa Fe,* 453 F. Supp. at 926 (state commodities regulations preempted due to statewide impact).

C. The HMTA

The HMTA also contains a preemption provision. That section provides that

> any requirement of a state or political subdivision thereof, which is inconsistent with any requirement set forth in [the, HMTA], or in a regulation issued under the [the HMTA], is preempted.

49 U.S.C. § 1811(a) (1976). Regulations adopted pursuant to the statute also allow a state to apply for an "inconsistency determination" by the Secretary of Transportation to determine if a state rule is preempted under section 1811(a). 49 C.F.R. § 107.203 (1986). The Secretary may waive the preemptive effect of the statute and regulations should she find the state rule inconsistent, so long as the requirements of section 1811(b) are met. *Id.* at 1811(b). The RRC has not sought such a determination from the Secretary.[2] Much like the FRSA, the HMTA was enacted to provide a means of uniform regulation of the transportation of hazardous materials. *Consolidated Rail Corp. v. City of Dover*, 450 F. Supp. 966 (D. Del. 1978). *See also* H. REP. NO. 1083, 93rd Cong. 2d Sess., 4, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7669 (stating purpose of Act was to "broaden federal regulatory control over interstate or foreign shipments of hazardous materials by rail and other transportation modes"). In determining whether a state rule is inconsistent with the HMTA or its regulations, a court must make a two-fold inquiry:

> (1) Whether compliance with both the state rule and the HMTA (or its regulations) is possible;

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[2] A party need not seek an inconsistency determination before litigating the issue. *National Tank Truck Carriers v. Burke*, 608 F.2d 819, 822 (1st Cir. 1979); *New Hampshire Motor Transport Association v. Flynn*, 751 F.2d 43, 50-51 (1st Cir. 1984).

(2) The extent to which the state rule is an obstacle to the accomplishment and execution of the HMTA and its regulations.

National Tank Truck Carriers, Inc. v. Burke, 535 F. Supp. 509, 515 (D.R.I. 1982), *aff'd.* 698 F.2d 559 (1st Cir. 1983). As noted in *Tank Truck Carriers*, these criteria are the traditional judicial tests of preemption. *Id.*

It is under this vast body of federal law that the Court must now examine section 5.622 and determine if any of these statutes preempt the section.

D. Section 5.622

16 TEX. ADMIN. CODE § 5.622 provides as follows:

(a) Except as provided in subsections (c) and (d) of this section, each railroad corporation operating in the state of Texas shall place a caboose occupied by at least one employee on the train crew as the last car on any freight train that is required by the Federal Railroad Administration rules (49 Code of Federal Regulations Part 232) to have its air system and cars inspected by qualified inspecting employees or certified federal inspectors. The exception prescribed in subsection (d) of this section shall not apply to any train in which the consist includes any car containing a load or residue of a hazardous material included in the following Standard Transportation Commodity Code (Western Truck Line Committee, Agent, Tariff STCC 6001 series) groups: 4901 (Class A explosives); 4902 (Class B explosives); 4904 (non-flammable compressed gases); 4905 (flammable compressed gases); 4906, 4907, 4908 (flammable liquids); 4920 (poisons Class A); 4921 (poisons Class B); and 4930 (corrosive materials).

(b) Each caboose must be equipped with an operable radio system which will enable two-way communication between the caboose and the head of the train.

(c) A caboose is not required on freight trains satisfying either of the following conditions:

(1) a length of 2,000 feet or less; or

(2) operating within a railroad yard or within yard limits as designated pursuant to 49 Code of Federal Regulations § 218.35.

(d) A caboose is not required on freight trains satisfying all of the following conditions:

(1) flag protection against following trains on the same track is not required by 49 Code of Federal Regulations § 218.37;

(2) the track route is equipped with wayside overheated journal and dragging equipment detectors located along such route, at intervals not exceeding 30 miles in distance, which are able to communicate directly to the train's operating crew information related to the safety of that train's operation, including: acknowledgement of the train's presence at the detector, the nature of the defect found, and the location within the train of any defect detected;

(3) the track route is equipped with high-shifted load detectors in advance of locations where it can reasonably be foreseen that a high or shifted load could cause an unsafe condition when moving through such locations;

(4) there is an operating telemetry device located on the trailing end of the rear-most car capable of communicating the following information to the locomotive engineer: motion, brakepipe pressure, and power condition of the transmitting device;

(5) there is a counting device which enables the locomotive engineer to ascertain the length of the train; and

(6) there are no cars containing open top loads which exceed the railway's line clearances, as published

annually (National Railway Publication Company, *Railway Line Clearances*), placed farther than 2,000 feet behind the controlling locomotive.

(e) Any railroad corporation may apply for a variance from the requirements of this section on a form to be prescribed by the commission. Such application shall be governed by the rules contained in Chapter 5, Subchapter U of this title (relating to General and Special Rules of Practice and Procedure), as they may be from time to time amended. The Commission may approve such application for good cause shown.

(f) Each railroad corporation shall comply with the provisions of this section no later than six months after the effective date of this section.

The rule thus requires that *any* train longer than 2,000 feet which has a consist including a listed hazardous material or its residue *must* have a caboose outside rail yards, regardless of whether the six requirements of section (d) are met. Further, any train longer than 2,000 feet operating outside of a rail yard, regardless of its contents, must either operate on a track meeting the requirements of section (d), or have a manned caboose as the last car. The requirements of section (d) thus become very important. Those requirements are that (1) no flag protection is required by federal regulation; (2) the track is equipped with overheated journal and dragging equipment detectors, at specified intervals, able to communicate directly with the locomotive; (3) the track is equipped with high/shifted load detectors in specified locations; (4) the train is equipped with an operating telemetry device at the rear of the train capable of communicating specified information to the locomotive engineer; (5) the train is equipped with a counting device enabling the locomotive engineer to determine the length of the train; and (6) there are no cars withopen top loads exceeding the railway's line clearances. Further, section (b)

provides that all cabooses must be equipped with a radio capable of two-way communication with the locomotive.

1. Locomotive equipment

As noted earlier, the LBIA has been held to completely preempt the field of locomotive equipment. *Napier,* 272 U.S. at 613. This rule was affirmed in *Consolidated Rail,* where the court ruled that a Pennsylvania regulation requiring speed recorders and indicators to be placed on locomotives was preempted by the LBIA. 536 F. Supp. 653. That decision was affirmed without opinion by both the Third Circuit, 696 F.2d 981, and the Supreme Court, 461 U.S. 912. The prohibition against state legislation in this area "extends to the design, the construction and the material of every part of the locomotive and tender and of all the appurtenances." *Napier*, 272 U.S. at 611.

The Railroads contend that because section (b) requires a radio in the caboose capable of two-way communication with the locomotive, it also in essence requires such a radio in the locomotive. This, they argue, is prohibited by the LBIA, as a radio is locomotive equipment. The RRC responds by stating that the rule requires nothing in the locomotive, and that even if it does, a radio is not an appurtenance, and is outside the scope of the LBIA's preemptive sphere. The RRC's first argument defies logic. If the caboose must have a radio capable of two-way communication with the locomotive, then the locomotive must be equipped with at least a compatible radio. The rule does in effect, therefore, require any locomotive pulling a train with a caboose to have a two-way radio capable of communicating with the caboose.

The only remaining question then, is whether this rule is one governing locomotive "equipment or appurtenances." The RRC argues that an appurtenance is

something which is in fact an integral or essential part of a completed locomotive, *citing Southern Railway Co. v. Lunsford,* 279 U.S. 398, 402 (1936). This, they argue, does not include a radio. *Lunsford* does not support the RRC's argument, however. The Supreme Court's statement in *Lunsford* was that "whatever in fact is an integral or essential part of a completed locomotive, *and all parts or attachments* definitely prescribed by lawful order of the Interstate Commerce Commission, are within the statute." *Id.* at 402. The Court went on to say that "mere experimental devices which do not increase the peril, but may prove helpful in an emergency, are not" prohibited by the LBIA. *Id.* A radio is not a "mere experimental device," and is certainly a part or attachment to the locomotive. *Lunsford* is thus inapplicable to this case. The Court is of the view that a radio is certainly a part or appurtenance of a locomotive governed by the LBIA, and section (b) is therefore preempted by the LBIA.

This result is confirmed by the Supreme Court's affirmance of the *Consolidated Rail* decision. In *Consolidated Rail* the equipment at issue was a speed recorder and indicator. Such equipment is neither integral nor essential to the operation of a locomotive. Nevertheless, the court found that the Pennsylvania requirement was preempted by the LBIA, and that decision was affirmed by both the Third Circuit and the Supreme Court. *Consolidated Rail,* 536 F. Supp. 653, *aff'd.,* 696 F.2d 981, *aff'd.,* 461 U.S. 912.

Section (d)(4) is also challenged by the Railroads. That section requires an operating telemetry device on the rear of the train capable of communicating designated information to the locomotive engineer. Although the RRC argues that, like the radio rule, this provision does not require anything on the locomotive, it is clear that the rule would require a unit on the locomotive able to receive signals from the rear-end device. Moreover, the RRC itself has

recognized that the requirement necessitates installation of equipment in the locomotive. *See* Defendant's Response to Request for Admission No. 13 (admitting that the rule requires "telemetry receiving equipment installed on the locomotive"). *See also Transportation Division Memorandum and Recommendation* on section 5.622 at 33, 41. There can be no question that such a requirement is preempted by the LBIA. Likewise, subpart (5) of section (d) is preempted, as it requires a counting device which enables the engineer to determine the length of the train. This device also requires installation of a locomotive receiving appliance. *Id.* at 42. ("This odometer device is considered as an appurtenance to the head end unit of the telemetry device.") The subpart is therefore preempted by the LBIA.

The Railroads also argue that section (d)(2) is preempted by the LBIA. That subpart requires the installation of dragging equipment and overheated journal wayside detectors, located at specified intervals, and capable of "communicate[ing] directly to the train's operating crew" certain information. The Railroads argue that this means that a receiving device must be placed in the locomotive to receive the signals from the wayside detectors. The RRC responds that the rule does not *require* such equipment, as some detectors merely use a signal on the roadbed which alerts the crew that a detector has located a problem. The crew then receives specific information from a readout on the roadbed.

The Court is of the view that the rule does require the installation of equipment in the locomotive. First, the rule states that the detectors must be capable of communicating information "*directly* to the train's operating crew." This language implies that the detectors required are distinct from detectors which communicate indirectly, such as the roadbed readouts the RRC argues the rule allows. The RRC's own evidence supports this conclusion. The RRC offered the

testimony of Robert S. Farnsworth on this point. His testimony was:

> The next portion of the rule, 5.622(d)(2), requires the placement of wayside overheated journal and dragging equipment detectors along the routes chosen by the railroads to operate caboose less trains. The railroads industry's position is well known that technological advances, particularly in the realm of wayside detectors, has made an occupied caboose obsolete. What the railroads do not publicize is the fact that not all rail routes are equipped with such detectors. Furthermore, many of the detectors now in place cannot and do not communicate the train's status to the crew members located on the train's head end. The detector readout and alarm light at these sites are located immediately adjacent to the detector; therefor, the only means of communications [sic] between the detectors and the train crew is visually from the caboose as the train completely passes the detector. The UP and the MKT both testified that this type of detector is being upgraded to one that "talks" to the train crew. Until the upgrade programs are completed, however, these detectors are useless for trains being operated without a caboose. Hence, operating expediency, not technology, is replacing the caboose for trains operating over these routes. For this reason, the Commission requires not only the installation of wayside detectors but that the detectors be able to communicate basic train-related

> information to the head-end train crew if a long freight train is to operate without a caboose.

Affidavit of Robert S. Farnsworth at 9. Further support for this construction of the rule is found in the *Transportation Division Memorandum and Recommendation* on 5.622, where the distinction between "talking" detectors and other types of detector is discussed. *Id.* at 28-31. One of the noted differences was that "talking" detectors convey signals "directly" to the train crew. *Id.* at 30. Finally, the RRC's statements in enacting the rule praise the effectiveness of detectors which "transmit an audible or radio readout signal to the locomotive engineer ...." 11 Tex. Reg. at 2975 (1986). The only logical conclusion from all this is that subpart (d)(4) requires detectors that "talk" to the head-end of the train, and thus require the installation of equipment on the locomotive. This requirement is preempted by the LBIA.

In summary, the LBIA preempts section (b) and sections (d)(2), (4) and (5), as those sections require the installation of equipment on the locomotives of trains.

2. Rail Safety Regulations

As discussed above, the FRSA prohibits the states from enacting laws in any area where federal regulation has completely occupied the field. If federal regulation address a rail safety matter but do not wholly occupy the field, state regulation is only permitted if the three-prong test of 45 U.S.C. § 434 is met. Finally, if there is no federal regulation covering a rail safety matter, the states are free to regulate the area.

The Federal Railroad Administration (FRA) has considered and rejected proposals similar to the instant rule. In 1986 the FRA discussed a proposed rule allowing the use of end-of-train telemetry devices as substitutes for visual

inspection of braking systems. In discussing the comments received on the rule the FRA stated that:

> The major objection raised by commenters opposed to the proposed rule was the opinion that elimination of a caboose from the end of a train adversely affects safety. For example, the comments of the Railway Labor Executives' association and the United Transportion Union called for new requirements, e.g., overheated bearing/wheel detectors, train length restrictions, and dragging equipment detectors, to counteract the perceived safety detriment of cabooseless trains. FRA does not agree with this line of analysis. First, nothing in any current FRA regulation requires a caboose on any train, nor does anything in the final rule issued in this docket authorize the removal of a caboose. The determination on whether a railroad uses a caboose on any given line is made through the collective bargaining process. Moreover, the FRA does not consider the lack of a caboose to be a safety issue per se. While this final rule may facilitate railroads' obtaining economic benefits from cabooseless operations, it does not in any way determine whether a caboose will or will not be used. 51 Fed. Reg. 17,300-301 (1986). The proposed rule was adopted and is now codified at 49 C.F.R. § 232.19 (1986). It is noble that one of the commentators mentioned by the FRA was the party who initiated the rule-making procedure before the RRC in this case. *See Petition*

> *Proposing Rulemaking Requiring Cabooses on Trains*, filed by the United Transportation Union of Texas. The FRA's statements make it clear that it rejected the commentator's proposal that either a caboose be required on trains, or certain equipment be required in lieu of a caboose.

The FRA's inaction in this area constitutes an affirmative ruling that caboose regulation is inappropriate. *Ray v. Atlantic Richfield Co.* , 435 U.S. 151, 178 (1978). In *Ray* the Court stated that it:

> has previously recognized that 'where failure of ... federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute,' states are not permitted to use their police power to enact such a regulation.

Id. citing Napier, 272 U.S. at 605. The FRA's refusal to implement a rule requiring a caboose on trains, or in the alternative to require certain equipment on tracks, takes on the character of a ruling that no such regulation is appropriate. At a minimum, the FRA has addressed the subject matter of section 5.622, and has refused to enact caboose regulations. In order for section 5.622 to be valid, therefore, it must pass the three-prong test of 45 U.S.C. § 434. By its own admission, the RRC recognizes that section 5.622 is statewide in its application, and therefore does not addresses a local safety hazard. *See* Defendant's Response to Request for Admission No. 1. Thus, the rule is preempted.

Regardless of whether the entire rule is preempted, select provisions of section 5.622 are preempted under the FRSA. For example, the Railroads argue that section (d)(1)

is preempted by the FRSA. That section is one of the six requirements a track must meet before a cabooseless train may be operated on that track. Section (d)(1) requires that no flag protection be required by federal regulation before a cabooseless train may run on the track. The Railroads point out that 49 C.F.R. § 218.37 details the safety precautions that must be taken when flag protection is appropriate. The requirement of a caboose is not included among those precautions. Thus, the Railroads argue that section 218.37 completely occupies the field, or at least addresses the subject matter of section (d)(1), and (d)(1) is therefore preempted. It is clear that the FRA has addressed the subject matter of the precautions necessary when flag protection is required. *See* 49 C.F.R. § 218.37 (1986). Indeed, it is arguable that section 218.37 wholly occupies the field in this area. The Court need not decide this latter issue, however, as it is clear that the FRA has addressed the issue, and that section (d)(1) fails the three-prong test of 45 U.S.C. § 434 for failure to address a local safety hazard. The RRC does not deny that section (d)(1) imposes statewide standards. *See* Defendant's Response to Request for Admission No. 1. Thus, the first part of the three-prong test of section 434 has not been meet, *see supra* at 9, and the subpart is preempted. 45 U.S.C. § 43 (1986).

The FRA's statements when enacting 49 C.F.R. § 218.37 support this conclusion. In discussing public comments on the proposed rule, the FRA stated that one commentator:

> would prefer that regulation in this area be left to the various states. As stated above, the FRA believes that there are adequate provisions for the safety of train movements within automatic block signal territory without the addition of protective flagging. Safe train operations are dependent upon the train crew's strict compliance with all signal indications,

operating rules and other instruction governing the the movement of their train. The FRA believes that this rule provides an adequate degree of safety in a reasonable manner. With respect to this commender's preference for state regulation as opposed to federal regulation, the policy of the Federal Railroad Safety Act of 1970, as expressed in section 205 (45 U.S.C. § 434), has committed FRA to promoting uniform to national regulation, to the extent practicable. The FRA, as well as NTSB, has noted the need for revision of rule 99. We cannot assure that all states will adopt a regulation, and even if all did, we cannot assure that all 50 would be uniform. The necessity of complying with a multitude of rules is not only burdensome to carriers, but also confusing to operating employees. The FRA believes, therefore, that a single uniform Federal regulation is preferable to a multitude of different state regulations.

Another commender asked that the final regulation specifically provide that more stringent state rules or laws would take precedence over a less stringent federal regulation. The relationship between federal regulations issued under the Federal Railroad Safety Act and State regulations governing the same subject matter is governed by section 205 of that Act. That statutory provision prescribes the preemption of all state laws, rules, regulations, orders and standards concerning the same subject matter as a federal regulation except where such a state provision addresses an essentially local safety hazard and is not incompatible with the federal provision. In of this statutory provision, FRA does not have the authority to amend the rule as requested by this commenter.

42 Fed. Reg. 5062 (1977). As noted, section (d)(1) does not address a local safety hazard, and it is therefore preempted.

Section (d)(2) suffers from a similar deficiency. That section requires that cabooseless trains run on a track equipped with overheated journal and dragging equipment detectors, at specified intervals The FRA has already addressed the subject matter of dragging equipment detectors. 49 C.F.R. § 236.601 provides:

> Signals controlled by devices used to provide protection against unusual contingencies, such as landslides, dragging equipment, burned bridges or trestles and washouts shall be located so that stopping distance will be provided between the signal and the point where it is necessary to stop the train.

49 C.F.R. § 236.601 (1986). The RRC admits that section (d)(2) is statewide in application, and thus does not address a local safety hazard. Defendant's Response to Request for Admission No. 1. Insofar as section (d)(2) addresses the area of dragging equipment detectors, it is preempted by section 236.601.

The Railroads also contend that section (d)(4) is preempted by the FRSA. Section (d)(4) requires the use of end-of-train telemetry devices on cabooseless trains. As noted at the outset of this section, the FRA recently adopted a rule allowing the use of such devices as substitutes for visual inspection of brake systems During the rule-making proceeding the FRA received comments suggesting the necessity of such devices on trains without cabooses. *See* 51 Fed. Reg. 17,300-301 (1986) (quoted *supra* at 20). The FRA expressly rejected the commentator's proposal, and enacted a rule which does not require telemetry devices on cabooseless trains. *See* 49 C.F.R. § 232.19 (1986). The

FRA's action constitutes an affirmative ruling that such regulation is inappropriate. Section (d)(4) is therefore preempted. 45 U.S.C. § 434; *Ray*, 435 U.S. at 178.

Finally the Railroads argue that section (b) is preempted under the FRSA, because rail safety rules already address the area of radio communications, and section (b) does not meet the three-prong test of section 434. The Railroads cite 49 C.F.R. §§ 220.23, 220.39, and 220.47 as proof that federal regulation already addresses this area. These regulations address procedure for the use of radios in manned cabooses or locomotives. The Court has already found section (b) preempted under the LBIA. The Court therefore declines to resolve the question of whether the FRA has addressed the subject matter of section (b), as it is unnecessary to resolution of the case.

In summary, the FRSA preempts all of section 5.622. The FRA considered the caboose issue and decline to enact a rule requiring a caboose or requiring certain equipment on cabooseless trains. In the alternative, and at the very least, the FRSA preempts sections (d)(1) and (4), and that part of (d)(2) relating to dragging equipment detectors, as the FRA has addressed these areas, and the relevant sections do not address local safety hazardous.

3. Hazardous materials

The HMTA contains its own preemption provision. That provision provides for the preemption of state laws that are inconsistent with any requirement of the HMTA or a regulation promulgated thereunder.[3] 49 U.S.C. § 1811(a) (1976). To determine if a state law is "inconsistent" under section 1811(a) the Court must decide:

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[3] The Court will hereafter refer to regulations promulgated pursuant to the HMTA as hazardous materials regulations, or "HMR."

(1) Whether compliance with both the state rule and the HMTA is possible; and

(2) The extent to which the state rule is an obstacle to the accomplishment and execution of the HMTA and its regulation.

Tank Truck Carriers, 535 F.Supp. at 515. The Railroads contend that section 5.622's requirement of a caboose on all trains over 2000 feet in length with a consist or residue of hazardous materials is inconsistent with the HMTA or HMR in several ways. The Court will focus on two of those arguments: First, whether the rule is inconsistent with the HMTA or HMR because it will cause delays and extra switching and handling of hazardous materials, and next, whether the rule is inconsistent because it creates a hazard class or classes with requirements in addition to those set by the HMTA and its regulations. The Court will discuss only these arguments. The Court declines to reach a conclusion on the Railroads' other arguments for inconsistency, as they are unnecessary to the resolution of this issue.

The Railroads' first argument turns on the resolution of factual matters. The Railroads submitted affidavits from Chris Anadnesen of the Union Pacific Railroad Company (which system includes the Missouri Pacific Railroad Company); A.M. Hensen of the Southern Pacific Transportation Company; D.E Mader of the Atchison, Topeka and Santa Fe Railway Company and Andrew J. Thompson of the Burlington Northern Railroad Company; and L.D. Fields of the Kansas City Southern Railway Company and its subsidiary, the Louisiana and Arkansas Railway Company. In response, the RRC filed the affidavits of Robert S. Farnsworth, a State Rail Planner with the RRC; Hugh F. Keepers, Director of Safety for the RRC; and Doug M. Gott, a conductor with the Union Pacific Railroad Company. The Railroads submitted the additional

affidavit of Leo R. Tierney of the Union Pacific Railroad in its Reply to the RRC's Response. The Railroads also tendered five exhibits after the hearing. The Court received no objection from the RRC, and those documents are part of the record of this case. They include discovery responses in this case, as well as the administrative record of the rulemaking proceedings before the RRC on this matter. The Court has reviewed all these documents in reaching the following factual findings.

The evidence submitted by the Railroads indicates that rule 5.622 will cause an increase in the handling time of train cars carrying hazardous materials, as well as an increase in the switching of cars containing such materials. The increases would occur due to consolidation of hazardous materials on trains. The Railroads' witnesses testified that they have a limited number of cabooses available for use, and the costs incumbent in purchasing new cabooses or refurbishing unused cabooses require the Railroads to consolidate shipments of hazardous materials. By consolidating such shipments, the Railroads would minimize their need for cabooses under section 5.622. Such consolidation would also save time in adding cabooses on trains entering Texas from states which do not have a caboose requirement.[4] The RRC offered no evidence to dispute these claims by the Railroads. Rather, the RRC argued that consolidation is simply the result of managerial decisions, and is not caused by the rule. The RRC offered no evidence, however, that the decision of the Railroads were imprudent or unnecessary. The Court is of the view that the evidence clearly demonstrates that section 5.622 will

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[4] Only the states of Oregon, Montana, Virginia and Nebraska have some sort of caboose requirement. Nebraska is phasing out cabooses, culminating in April, 1988, when no cabooses will be required. New Mexico also enacted a caboose rule, but the rule was voided by the New Mexico Supreme Court on state grounds.

be the cause of such consolidation and that the decisions of the Railroads to consolidate shipments are reasonable decisions brought on by the economic forces of the market in conjunction with the requirements of section 5.622.

The evidence submitted by the Railroads also indicates that consolidation will cause delays in the shipment of hazardous materials. The reason for the delays is that in order to combine cars on one train, it will sometimes be necessary to set aside cars carrying hazardous materials to await the arrival of other cars with similar loads. In addition, the adding of cabooses as trains cross into Texas will cause a delay of 20 to 30 minutes per train. Delays will also be caused by re-routing. The Santa Fe Railway Company representative testified that prudent management would require the Santa Fe to route shipments of hazardous materials around Texas, in ordered to avoid adding cabooses. Such re-routing would cause up to six additional hours of running time on the longer route. The RRC did not offer any evidence contradicting these statements. The Court finds that the evidence clearly supports the conclusion that the rule will cause the delays stated.

Consolidation also causes additional switching and handling of cars carrying hazardous materials. This, in turn, will be more than likely to cause an increase in accidents. As the Union Pacific official pointed out, from 67% to 76% of all accidents in Texas on the Union Pacific involving hazardous materials occurred during switching. Once again, the RRC does not challenge these figures, or the Railroads' statements that additional switching will occur under the rule, except to argue that the switching is not the result of the rule, but rather of managerial decisions. The Court is of the view that the undisputed evidence indicates that additional switching and delays will occur if section 5.622 is enacted. Moreover, there is no evidence to support the RRC's argument that section 5.622 is not the cause of the delays and switching, and the Court rejects that argument.

The question the Court must examine next is: does the fact that the rule will cause additional switching and handling of hazardous materials, as well as delays in the shipments of such materials, cause the rule to be inconsistent with the HMTA or HMR, and thus preempted under 49 U.S.C. § 1811(a)? An inconsistency determination requires the two-fold inquiry set out in *Tank Truck Carriers*. First, the Court must determine if compliance with both section 5.622 and the HMTA and HMR is possible. If so, the Court must then determine if the state rule is an obstacle to the accomplishment of HMTA's and HMR's objectives. *Tank Truck Carriers*, 535 F. Supp. at 515. *See also* General Preamble to Inconsistency Rulings IR-7 through IR-15, 49 Fed. Reg. 46, 632-633 1984).

There is no serious contention that compliance with both the HMTA and HMR and the caboose rule of section 5.622 is impossible. The Railroads did not offer evidence to show that dual compliance was impossible, and thus if the rule is inconsistent with the HMTA or HMR. it must be because the rule is an obstacle to the accomplishment of the objectives of the HMTA. In order to make this determination, it is necessary to examine the purposes and objectives of Congress in enacting the HMTA, and the manner in which the objectives have been carried out by the Research and Special Projects Administration (RSPA), successor to the Materials Transportation Bureau, the division of the Department of Transportation charged with implementing the HMTA and HMR.

The HMTA was enacting to deal with the fragmentation that had occurred in the supervision of the transportation of hazardous materials, and to consolidate the regulation of such transportation in one body. *Tank Truck Carriers* , 535 F. Supp. at 516. Congress' intent was "to improve the regulatory and enforcement authority of the Secretary of Transportation to protect the Nation adequately against the risks to life and property which are inherent in the

transportation of hazardous materials in commerce." 49 U.S.C. § 1801 (1976). The legislative history indicates that the Congress intended to attain this goal by uniform national regulations, which would "preclude a multiplicity of state and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials regulation." *Tank Truck Carriers*, 535 F. Supp. at 516, *citing* S. REP. NO. 1192, 93rd Cong., 2d Sess. 37 (1974). Thus, the states are limited in the regulations they may impose on the transportation of hazardous materials by the dominant authority delegated to the Department of Transportation.

In an attempt to minimize the potential for accidents during shipments, the HMTA regulations require the swift movement of such shipments. Thus, in Inconsistency Ruling 2, the RSPA stated that:

The manifest purpose of the HMTA and the Hazardous Materials Regulations is safety in the transportation of hazardous materials. Delay in such transportation is incongruous with safe transportation. Given that the materials are hazardous and that their transport is not risk free, it is an important safety aspect of the transportation that the time between loading and unloading be minimized.

Inconsistency Ruling 2, 44 Fed. Reg. 75,566, 75,571 (1979). These remarks were echoed in Inconsistency Ruling 16:

> Since safety risks are "inherent in the transportation of hazardous materials in commerce" [49 U.S.C. § 1801], an important aspect of transportation safety is the minimization of time in transit. This objective has been incorporated in the HMR at 49 C.F.R. 177.853, which direct highway shipments to proceed without unnecessary

> delay, and at 49 C.F.R. 174.14, which directs rail shipments to be expedited within a stated time frame.

Inconsistency Ruling 16, 50 Fed. Reg. 20,872, 20,879 (1985). The courts have found state regulations to be preempted because they would cause a delay in the transportation of hazardous materials. *See e.g., Tank Truck Carriers,* 535 F. Supp. at 517-18 (concerning highway movements).

In addition, the Department of Transportation has enacted extensive regulations governing the handling of hazardous materials. The regulations are found at 49 C.F.R. § 174.83 to 174.93 (1986). The requirements make clear the Department's view that switching of such cars must be done safely, so as to minimize accidents.

It is the Court's view that section 5.622 will stand as an obstacle to the accomplishment of the objectives of the HMTA and its regulations. The HMTA and its regulations. The HMTA and its regulations attempt to speed the transportation of hazardous materials and minimize the handling of such materials., in an attempt to minimize the risk of accidents. Section 5.622 thwarts this objective, as it will create delays in shipping, and extra switching and handling of materials. Thus, the rule is inconsistent with the HMTA under 49 U.S.C. § 1811(a), and is therefore preempted.

The RSPA has also found state regulations that enact more stringent requirements on certain classes of federally regulated hazardous materials to be inconsistent under 49 U.S.C. § 1811(a). For example, in Inconsistency Ruling 12 the RSPA found a regulation enacted by a New York county to be inconsistent because it set more stringent requirements on certain classes of radioactive materials than set by HMTA regulations. The RSPA noted that

By imposing additional requirements on a subgroup of radioactive materials, St. Lawrence County has, in effect, created a new hazard class. If every jurisdiction were to assign additional requirements on the basis of independency created at variously named subgroups of radioactive materials, the resulting confusion of regulatory requirements would lead directly to the increased likelihood of reduced compliance with the HMR and subsequent decrease in public safety. As stated in IR-6:

> The key to hazardous materials transportation safety is precise communication of risk. The proliferation of differing state and local systems of hazardous classification is antithetical to a uniform, comprehensive system of hazardous materials transportation safety regulation. This is precisely the situation which Congress sought to preclude when it enacted the preemption provision of the HMTA [49 U.S.C. 1811]. [48 FR. 764].

Inconsistency Ruling 12, 49 Fed. Reg. 46,650, 46,651 (1984). The RSPA has stated in several rulings that it considers the federal role in the definition of hazard classes to be exclusive. *See e.g.,* Inconsistency Ruling 5, 47 Fed. Reg. 51,991 (1982). Inconsistency Ruling 6, 48 Fed. Reg. 760 (1983); Inconsistency Ruling 8, 49 Fed. Reg. 46,637 (1984); Inconsistency Ruling 15, 49 Fed Reg. 46,660 (1984). The basis for this view is well-founded. The Department of Transportation under the authority granted it by Congress in the HMTA, has enacted an extremely technical set of regulations, occupying almost 1000 pages of the C.F.R. *See* 49 C.F.R. §§ 171-177 (1986). If state and local bodies added additional requirements based on certain

hazard classes, yet another level of complexity would be added to the regulations. "Such duplication in a regulatory scheme where the Federal presence is so pervasive can only result in making compliance with the HMR less likely, with an accompanying decrease in overall public safety." 47 Fed. Reg. at 51,994.

Section 5.622 purports to require a caboose on all trains in excess of 2000 feet which are carrying a consist or residue of ten specific materials. The ten materials have two sources. Five of the classes were identified by the FRA as being of special concern in a publication entitled 'Rail Hazardous Materials Movements, Region 5: Ft. Worth," dated November, 1982. The other classes were added by the RRC based upon its view that the materials pose equally significant threats. *See* 11 Tex. Reg. 2976 (1986); affidavit of Robert S. Farnworth at 15. The materials are referred to by "STCC codes, " which refer to listings in the Standard Transportation Commodity Code Tariff STCC 6001-J. It appears that all ten categories are defined in Part 173 of 49 C.F.R.

As noted earlier, the Department of Transportation has enacted extensive regulations detailing all the requirements a shipper must follow in transporting the materials defined as hazardous in HMTA regulations. None of those regulations require the placement of a caboose on the end of a train carrying the ten classes of hazardous materials set out in section 5.622. Thus, section 5.622 adds yet another requirement for the shipment of those items. The RSPA has repeatedly held that state or local rules which add additional requirements on certain classes of hazardous materials are inconsistent with the HMTA and its regulations. *See supra* at 32. The rationale for these findings is summed up well in Inconsistency Ruling 15, where the RSPA found inconsistent a Vermont Rule placing restrictions on certain classes of radioactive materials (termed "RADWAS"):

> By imposing additional requirements on a subgroup of highway route controlled quantity radioactive material to be know as RADWAS, Vermont has created a new hazard class. If every state were to assign additional requirements on the basis of independently created and variously named subgroups of radioactive materials, the resulting confusing of regulatory requirements would lead ineluctably to the increased likelihood of reduced compliance with the HMR [a]nd subsequent decrease in public safety.

Inconsistency Ruling 15, 49 Fed. Reg. 46,660 (1984). On this same basis, the Court is of the view that section 5.622, insofar as it purports to regulate hazardous materials, is inconsistent with the HMTA and its regulations, as ti stands as an obstacle to the accomplishment of the objectives of that statute.

In summary, the Court finds that section 5.622's regulation of trains carrying hazardous materials is preempted under the HMTA for two reasons. First, it is inconsistent with the objectives of expedited movements and safe handling of hazardous materials. Second, it assigns additional requirements to certain hazard classes, in a manner inconsistent with HMTA regulations. For these reasons, that part of section 5.622 regulating hazardous materials is preempted.

In addition, the FRSA preempts the hazardous materials portions of the rule. The FRSA provides that if "the Secretary has adopted a rule ... covering the subject matter of [a] state requirement," the state may only keep the requirement in effect if the three-prong test of the statute is met. *See* 45 U.S.C. § 434 (1986). As the Court has noted, the FRSA applies to all rules adopted by the Secretary of Transportation relating to rail safety. This includes

regulations promulgated under the HMTA that relate to rail transportation. *See supra* at 7, fn. 1. The discussion above makes it clear that the Secretary has promulgated extensive rules on the requirements necessary when transporting the ten hazardous substances specified in section 5.622. The Court is of the view, therefore, that HMTA regulations address the subject matter of the hazardous materials portions of section 5.622: the safety precautions necessary when transporting the ten substances set out in the rule. Thus, the rule is preempted unless it meets the three-prong test of section 434. The RRC had admitted that the rule is statewide in application, Defendant's Response to Request for Admission no. 1, and therefore it does not address a local safety hazard. The hazardous materials portions of the rule are therefore preempted by the FRSA as well.

4. Severability

In section III.D.2, above, the Court found that all of section 5.622 was preempted under the FRSA. The Court has also found, in the alternative, that many of the subparts of the rule are preempted independently. To summarize those findings, the Court has found that the LBIA preempts section (b) and sections (d)(2), (4) and (5). In addition, the FRSA preempts sections (d)(1) and (4) in their entirety, and that part of section (d)(2) relating to dragging equipment detectors, as well as the hazardous materials portions of the rule. Finally, the HMTA preempts that part of the rule requiring cabooses on trains over 2000 feet carrying hazardous materials or their residue. All that would remain of the rule if the Court invalidated only those portions preempted would be the general caboose requirement set in section (a), with an exception for trains under 2000 feet or operating in a yard or yard limits allowed in section (c). In addition, the remainder of section (d) would provide an exception for trains operating on track with high/shifted load

detectors, subpart (3), and without open top loads exceeding line clearances, subpart (6). Finally, section (e), providing for variances, would remain.

The question the Court must decide in determining whether to invalidate the entire rule, or only those parts preempted is whether the invalid provisions ar so intermingled with the remaining provisions that the intent of the regulation cannot be effected absent the invalid provisions. *United States v. Jackson,* 390 U.S. 570, 585 (1968); *EEOC v. Hernando Bank. Inc.* 724 F.2d 1188, 1190 (5th Cir. 1984). As the Supreme Court recently articulated the standard:

> The standard for determining the severability of an unconstitutional provision is well established: 'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as law.'

Alaska Airlines, Inc. v. Brock, ___ U.S. ___, ___, 107 S. Ct. 1476, 1480 (1987), *citing Buckley v. Voleo,* 424 U.S. 1, 108 (1976), *quoting Champlin Refining Co. v. Corporation Comm'n of Oklahoma,* 286 U.S. 210, 234 (1932). In this case, that determination is not difficult. The *Transportation Division Memorandum and Recommendation* makes it clear that a blanket caboose rule was rejected by that division. The division plainly recommended enactment of the rule only if the the exception in section (d) were added, and only if cabooses were required on all trains carrying hazardous materials. Moreover, the statements of the RRC in enacting the rule, *see* 11 Tex. Reg. 2974 (1986), echo these concerns. The RRC made it clear that with available technology, a blanket caboose rule was not, in its opinion, justified. The RRC also made it clear that if all the

conditions of section (d) were not met, a caboose should be used. In addition, the RRC stated that its concern for the safe transportation of hazardous materials required that a caboose be placed on all trains carrying hazardous materials or their residue. The statements also reflect the RRC's view of the importance of radio communication between the caboose and the locomotive. Clearly, the intent of the RRC was to pass section 5.622 as it originally was enacted, and not to create the rule that is left after the offending portions are removed.

This view is reinforced by the statements of the RRC's counsel at the hearing on this matter. In arguing that the rule should be upheld, he stated that the RRC was attempting to be as reasonable as possible in implementing section 5.622, and attempting to incorporate the views of the Railroads that exceptions were warranted. *See* Transcript of Hearing on Motion for Preliminary Injunction at 47-48. These statements also suggest that the RRC would not have enacted what remains of sections 5.622 after the preempted provisions are removed. The rule itself suggests the same result. Surely, the RRC would not have added the exceptions of section (d), or the hazardous materials requirements, if it did not view those sections as vital to the rule, as the original proposal did not contain any such exceptions or hazardous materials requirements. *See Petition Proposing Rulemaking Requiring Cabooses on Trains*.

Because the Court is of the view that the invalid provisions ar inextricably intertwined with the rest of the rule, and that the intent of the RRC would be effected if the valid portions were left standing, the Court will strike down all of section 5.622. *Jackson*, 390 U.S. at 585.

IV. CONCLUSION

The Court finds that the United States of America, acting through the Federal Railroad Administration and by the FRSA has addressed the field of cabooses on trains. Accordingly, any state action in those areas is preempted unless it meets the three-part test of 45 U.S.C. § 434. In this case, the subject rule, 16 TEX. ADMIN. CODE § 5.622, does not meet that test, and therefore it is preempted.

In addition, the Court finds that the United States of America, acting through the Federal Railroad Administration and the Material Transportation Bureau, and by the FRSA, the LBIA and the HMTA, has wholly preempted and occupied the subject matter of locomotive equipment and has addressed the subject matter of flag protection, dragging equipment detectors, telemetry devices, and the need for special equipment on hazardous materials trains. Accordingly, any state action in the area of locomotive equipment is preempted, and specifically, 16 TEX. ADMIN. CODE § 5.622(b), (d)(2), (4) and (5) are preempted. Further, any state action in the areas of flag protection, dragging equipment detectors, telemetry devices, and hazardous materials equipment is preempted unless it meets the three-part test of 45 U.S.C. § 434. In this case, the relevant portions of the rule fail the test, and thus 16 TEX. ADMIN. CODE § 5.622(d)(1), and (4), and that part of (d)(2) concerning dragging equipment are preempted, as are the rule's requirements concerning hazardous materials. In addition, those provisions concerning hazardous materials are inconsistent with the HMTA, and preempted under 49 U.S.C. § 1811(a). Moreover, because these preempted provisions are not severable from the remainder of the rule, the entire rule must fail.

ACCORDINGLY, IT IS ORDERED that 16 TEX. ADMIN. CODE § 5.622 IS VOID AS FEDERALLY PREEMPTED.

SIGNED and ENTERED this 17th day of June, 1988.

_/s/ JAMES R. NOWLIN

UNITED STATES DISTRICT JUDGE

APPENDIX C

TITLE 16. ECONOMIC REGULATIONS
Part I. Railroad Commission
of Texas
Chapter 5. Transportation Division

Subchapter AA. Rail Safety
* 16 TAC § 5.622

The Railroad Commission of Texas adopts new § 5.622 with changes to its text as proposed in the December 20, 1985, issue of the *Texas Register* (10 Tex. Reg. 4883). This new section is adopted to implement the provisions of Texas Civil Statutes, Article 6448a (Vernon Supplement 1986), which authorizes the Railroad Commission of Texas to regulate railroad safety.

As proposed, § 5.622 would have required railroad corporations to place a manned caboose on all freight trains of 2,000 feet or longer. A caboose would have been required on all trains, regardless of length, containing cars required to be placarded under the federal hazardous materials regulation.

Proponents of the proposed rule describe the importance of train crews in reporting right-of-way fires. Opponents of the rule reported that few fires are actually reported by rear end crews of the trains that start them. Railroads currently employ several means to reduce fires, including new braking methods which eliminate sparks, equipping road engines with spark arrestors, and watering bridges and patrolling tracks during especially dry periods.

It was contended by the rule's proponents that a manned caboose serves an important function in reporting accidents and rendering immediate aid. Opponents offered

reports showing that only 10% of a total 542 Texas grade crossing accidents, occurring during the first 10 months of 1985, involved a vehicle striking a train behind the locomotive. This same analysis, however, shows that caboose crews reported a significant portion of grade crossing accidents that occurred between the view of the head end crews.

If there is no caboose on a train, some members of the train crew might be required to ride on a second or subsequent locomotive. The question was raised as to whether such persons would be exposed to harmful levels of noxious fumes from the diesel exhaust. The information supplied was inconclusive, however, and does not support a recommendation that cabooses be required to protect crew members from diesel fumes. Railroad commentators also urge that relocating employees from the caboose to the locomotive has an important safety benefit in that personal injuries due to slack action would be reduced.

The Texas Class 1 Railroads contend that the commission is preempted from adopting §5.622 by the Federal Railroad Safety Act of 1970. The commission rejects this argument and notes that the Federal Railroad Administration has recently acknowledged that "nothing in any current FRA regulation requires a caboose on any train" (51 Federal Register 17300 (May 9, 1986)). It is also contended that Article 6448a does not authorize the commission to adopt the proposed rule. The commission rejects this contention; Article 6448a is a lawful delegation of authority which provides adequate standards to guide the commission in adopting rules concerning rail safety.

The railroads further argued that the exclusion of Class III Railroads in the proposed rule violates equal protection guarantees. That exclusion has been eliminated from the adopted rule because the commission finds that Class III Railroads would be practically excluded from caboose requirements by other provisions in the rule. Other

legal arguments, undue burden on interstate commerce and impairment of contracts, were unpersuasive.

The railroad opponents estimated the total 1984 Texas cost of cabooses to be $18,853,281.32. The cost study submitted on behalf of the railroads assumed that the proposed rule would require Texas railroads to operate up to 90% of all train movements with a caboose with a financial impact of $17.2 million. The telemetry end-of-train device was identified as an acceptable alternative to the caboose. The total cost associated with the telemetry device was estimated in 1984 dollars as $2,415,600.

The real cost of the proposed rule would have been much less than that reported in the railroads' cost study. Using the railroads' own assumption that 40% of all trains are now cabooseless, and assuming that all those trains would need cabooses if the proposed rule were to have been adopted, the resulting cost in 1984 dollars would have been no more than $8.5 million ($34,779,000 miles x 40% x $0.61).

The adopted rule is much less onerous to the railroads than the proposed rule. The incremental cost of complying with the recommended rule, when compared with current operations under the national rail labor agreement, appears to be negligible. The railroads would need only to change their current method of allocating and assigning existing cabooses to those approximately 25-40% of trains which wold require a caboose. The six-months period for compliance that has been added to the adopted rules will provide time to accomplish any necessary reassignments at lowest possible cost.

Chamber of Commerce organizations commented that a caboose requirement could adversely impact the attraction of new business to Texas. Three port authorities were concerned about a possible discriminatory burden on Texas ports. Numerous shippers and receivers opposed the proposed rule because of its perceived effect of increasing

rail transportation costs. The commission does not doubt the sincerity of these comments, but they were lacking in quantitative assessment of the impacts of the proposed rule. Since the adopted rule will, in all likelihood, impose no significant costs above those associated with current caboose usage, the commission believes that the concerns of these commenters have been addressed.

Proponents of the proposed rule contend that a caboose man is needed to detect hotboxes and avoid derailments. The frequency of overheated journals, of hotboxes, has substantially decreased with the replacement of plain journal bearings with roller bearings. The railroads report a concurrent decrease in broken journal derailments. The decrease is attributed not only to the replacement of plain journal bearings, but also to the use and increasing accuracy of electronic detection devices. Many of these devices, known as hotbox or overheated journal detectors, can transmit an audible or radio readout signal to the locomotive engineer whenever an overheated journal is sensed. The modern roller bearing journals do not smoke and flame when overheated like the plain journal bearings. The hotbox detectors can detect heat conditions which are not visible to a human observer.

The railroads' comments indicate that plain journal bearings are in use on approximately 20% of freight cars now in use. The comments showed that these bearings are more likely to cause derailments due to bearing failure than the newer generation bearings. Information concerning the rate at which plain journal bearings are being phased out of Texas railroad operations did not demonstrate that freight trains operating in the state would be free of plain journal bearings in the near future.

Traincrew members are trained to watch for unusual occurrences of dirt clouds arising from beneath the train, an indication of possible dragging equipment, and to stop the train for inspection if such condition is noted. Without a

crew member located on the rear end of the train, the manual monitoring capability provided by the crew is materially diminished.

As a substitute for, or addition to manual monitoring, railroads have installed dragging equipment detectors. These detectors often located with hotbox detectors, respond if any part of the passing train is hanging sufficiently low to the ground to present a clear hazard to the train. These devices detect brake rigging which has broken loose and is hanging at a level low enough to catch on the planking of a grade crossing or on the closure rail of a turnout. Such a situation can easily result in a major derailment as the rail is pulled apart underneath the train.

Crew members on long trains are unable to watch the rearmost portions of such trains for shifted loads. An alternative to physical observation that is used by major railroads is the installation of detectors which sense a piece of cargo protruding beyond a traincar's outer dimensions. The detectors communicate this information to the train's crew prior to the train's passage through bridges and other restricted areas. The devices are only needed on a site specific basis.

End-of-train telemetry devices can provide the locomotive engineer with more information about his train than was available in the past. These devices are composed of two separate units-one located at the rear of the train and one in the locomotive. The device can tell the engineer the air brake pressure on the rear car, whether the rear maker light is illuminated, and whether the rear car is moving or stopped. An odometer enables the engineer to determine the length of his train for handling purposes. While there are other rear end signal devices in use, none possesses the full range of capabilities of the telemetry devices demonstrated to commission personnel during this proceeding.

The proponents of the proposed rule correctly observe that no regulation requires railroads to have the

electronic monitoring devices in place for operation of trains without cabooses. Accordingly, the adopted rule requires that the track route over which a cabooseless train travels be equipped with wayside detectors, dragging equipment detectors, and high/shifted load detectors. Cabooseless trains are also required by the adopted rule to have an operating telemetry device located on the trailing end of the rearmost car as well as a counting device which enables the locomotive engineer to ascertain the length of the train. These requirements should save as an incentive for railroads to utilize state-of-the-art safety equipment.

Comments from proponents of the rule demonstrated a tendency by some railroads to operate a train without a caboose even when the crew is required to provide flag protection to the rear of a lengthy train. The adopted rule requires that flag protection against following trains on the same track not be required for the caboose-free train.

Several comments described a recurring problem on some of the state's railroads: the placement of oversized loads toward the middle or the rear of lengthy trains, often when the train is not provided with a caboose. These loads are generally accompanied by messaged warnings to the trains' crew to give the load or loads special protective handling, and often require special train orders to be issued. Such orders require that the crew visually inspect the load while it is walked through certain restricted areas, such as through bridges, when passing opposing trains on adjacent tracks, or when passing wayside signal masts.

Placing such loads beyond a reasonable distance from the traincrew encourages laxity in the loads required special handling and could potentially lead to a serious rail accident. The absence of a crew member located at the rear of the train makes imperative the need to locate oversized loads toward the head end of the train so that they may be properly observed.

The commission does not find sufficient justification for the imposition of a caboose requirement on all freight trains exceeding 2,000 feet in length. There are numerous safety factors to consider, however, in caboose-free train operations and in operations involving certain categories of hazardous meteors. The commission hereby adopts a rule which will assure that every presently available precaution is taken by railroads operating freight trains operating without cabooses and that cabooses be required on acutely hazardous materials shipments on trains over 2,000 feet long.

Public exposure to the hazards associated with rail transportation of dangerous substances is a greater potential problem in Texas than in most of the nation. Texas originated 22% of the nation's chemical and petroleum product rail tonnage in 1984 (the last year for which data are available), contrasted with 8.0% of the total rail tonnage. Accident statistics for 1985 show that Texas railroads experience twice the national average of hazardous materials accidents. The Texas total for 1985 was 47 reported hazardous materials incidents. In 1984, Texas ranked second in the number of people evacuated from accident sites, with 700 people and second in the number of railcars containing hazardous materials involved in accidents - 428.

The tank cars in which these hazardous material move constitute part of a fleet that is being replaced and updated at an increasingly slow pace, according to American Association of Railroad data. While this information is not specific to Texas the volume of hazardous rail traffic that originates here, mentioned in the preceding paragraph, would indicate that the Texas fleet is aging. The national data also show that tank cars increasingly are owned by businesses other than the railroads themselves. The railroads generally, must haul these privately owned tank cars, but they are not responsible for the maintenance or rebuilding of this equipment.

The proposed rule would have required any freight train operating outside a railroad yard to be equipped with a caboose, regardless of the train's length, if the train included any cars carrying hazardous materials covered by federal placarding rules. The rule adopted includes two important changes to the proposal: there is no caboose requirement for trains of less than 2,000 feet in length and the caboose requirement applies only to trains carrying hazardous materials that have the greatest potential of serious harm to the public or the environment, should a train wreck cause exposure to the materials.

The less than 2,000 feet exemption is an across-the-board exemption for shorter trains in the adopted rules. The commission is convinced that the head end crew can adequately monitor a 2,000 foot train so as to be able to prevent most accidents that could expose the public to acutely hazardous materials and, when accidents do occur, to be able to respond rapidly to alert the exposed population and emergency personnel.

As train length increases, however, there is no adequate substitute for having one ore more persons available to monitor the reaward portion of a train carrying the most hazardous substances. Trackside and on-board monitoring devices are capable of providing important information to locomotive crews that will help prevent accidents, but once a serious accident occurs, there is only limited information that the equipment can provide to the "head end." That equipment cannot assess the size of a hazardous materials spill, the particular substance involved the nature of the immediately exposed population, or the actual or potential environment damage Equally important only a person can alert the rest of the crew, the public, and emergency response alert caboose crewmen could, for example, quickly warn a small town or neighborhood to evacuate their homes and places of business-thereby preventing loss of life or serious injuries. On a train of

typical length, the head end crew may often be too remote from the event to assess the situation and provide a quick warning.

The proposal published for comment by the agency did not differentiate among the various materials designated as hazardous by the United States Department of Transportation (DOT). After closer examination of those designated materials and the potential danger they pose to the general public in cases of train accidents, the commission ha concluded that certain groups of materials do not require the added safeguard of a manned caboose if the special equipment requirements of § 5.622(d) of these rules are met. The remaining materials are in two categories, first, special concern or key hazardous materials designated by the DOT, second, those materials that possess characteristics that have an equally high potential to pose acutely dangerous situations. The first group consists of the categories: nonflammable compressed gases (4904), flammable compressed gases (4905), flammable liquids (4900), poisons A (4920) and poisons B (4921). The second group is made up of these five categories: class A explosives (4901), class B explosives (4902), flammable liquids (4907), and corrosives (4931). This addition brings within the rule several important materials such as gasoline, benzine, gasohol, sulfuric acid and hydrochorlic acid. Those materials present substantial and imminent risk to public safety and to the environment in the case of spills, leaks or fires resulting from major train wreck could have substantial adverse safety or environmental effects if a tank car carrying one of the listed category materials were burst.

The predictable frequency of serious wrecks involving acutely hazardous materials is relatively low, but the risk of serious harm to the exposed population and the environment once such an accident occurs can be very high. Requiring a manned caboose on each train carrying acutely hazardous materials is a policy choice for prudent protection

of safety. The commission is convinced by the public comments that a person at the end of a train can enhance safety. In the case of acutely hazardous train cargo, the commission has determined that there is no technological substitute for this safety enhancement. The commission acknowledges that the caboose requirement represents a fail-safe measure that will not be called into use in the routine train trip that proceeds without incident. In the exercise of its powers to protect public safety, the commission believes that this added safeguard is necessary and appropriate where the potential for harm from toxic materials accidents is high.

Any railroad corporation may apply for a variance from the rule's requirements. Such application may be approved for good cause shown. Railroad corporations shall comply with the provisions of the rule no later than six months after its effective date.

Approximately 439 written comments favored the proposed rule and approximately 169 written comments opposed it. During four days of public hearings, 46 persons spoke in favor of the rule and 27 persons opposed the rule.

Those commenting in favor of the rule were United Transportation Union, local fire departments, Attorney General Mattox, Land Commissioner Gary Mauro, individual members of the Texas Senate and Texas House of Representatives, and local elected officials. Those commenting against the rule were Texas Class I railroads, chamber of commerce organizations, rail shippers, port authorities, and individual members of the Senate and Texas House of Representatives.

The new section is adopted under Texas Civil Statutes, Article 6448a (Vernon Supplement 1986), which empowers the Railroad Commission of Texas to adopt regulations to ensure railroad safety.

§ 5.622 Requirement of Cabooses on Trains Operating in Texas

(a) Except as provided in subsections (c) and (d) of this section, each railroad corporation operating in the State of Texas shall place a caboose occupied by at least one employee on the train crew as the last car on any freight train that is required by the Federal Railroad Administration rules (49 Code of Federal Regulations Part 232) to have its air system and cars inspected by qualified inspecting employees or certified federal inspectors. The exception prescribed in subsection (d) of this section shall not apply to any train in which the consist includes any car containing a load or residue of a hazardous material included in the following Standard Transportation Commodity Code (Western Trunk Line Committee, Agent, Tariff STCC 6001 series) groups: 4901 (Class A explosives); 4902 (Class B explosives) 4904; (nonflammable compressed gases); 4905 (flammable compressed gases); 4906, 4907, 4908 (flammable liquids); 4920 (poisons Class A); 4921 (poisons Class B); and 4930 (corrosive materials).

(b) Each caboose must be equipped with an operable radio system which will enable two-way communication between the caboose and the head of the train.

(c) A caboose is not required on freight trains satisfying either of the following conditions:

(1) a length of 2,000 feet or less; or

(2) operating within a railroad yard or within yard limits as designated pursuant to 49 Code of Federal Regulations § 218.35.

(d) A caboose is not required on freight trains satisfying all of the following conditions:

(1) flag protection against following trains on the same track is not required by 49 Code of Federal Regulations § 218.37;

(2) the track route is equipped with wayside overheated journal and dragging equipment detectors located along such route, at intervals not exceeding 30 miles in

distance, which are able to communicate directly to the train's operating crew information related to the safety of that train's operation, including: acknowledgment of the train's presence at the detector, the nature of defect found, and the location within the train of any defect detected;

(3) the track route is equipped with high/shifted load detectors in advance of locations where it can reasonably be foreseen that a high or shifted load could cause an unsafe condition when moving through such locations;

(4) there is an operating telemetry device located on the trailing end of the rearmost car capable of communicating the following information to the locomotive engineer: motion, brakepipe pressure, and power condition of the transmitting device;

(5) there is a counting device which enables the locomotive engineer to ascertain the length of the train; and

(6) there are no cars containing open top loads which exceed the railway's line clearances, as published annually (National Railway Publication Company, *Railway Line Clearances*), placed farther than 2,000 feet behind the controlling locomotive.

(e) Any railroad corporation may apply for a variance from the requirements of this section on a form to be prescribed by the commission. Such application shall be governed by the rules contained in Chapter 5, Subchapter U of this title (relating to General and Special Rules of Practice and Procedure), as they may be from time to time amended. The Commission may approve such application for good cause shown.

(f) Each railroad corporation shall comply with the provisions of this section no later than six months after the effective date of this section.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on June 18, 1986.

JAME E. NUGENT
Chairman

MACK WALLACE AND
CLARK JOBE
Commissioners
Railroad Commission
of Texas

APENDIX Ð

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 87-1466

D.C. DOCKET NO. A-86-CA-569

MISSOURI PACIFIC RAILROAD, ET AL.
Plaintiffs-Appellees,

versus

RAILROAD COMMISSION OF TEXAS, ET AL.
Defendants-Appellants.

Appealed from the United States District
Court for the Western District of Texas

Before THORNBERRY, WILLIAMS, and DAVIS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED, that defendants-appellants pay to plaintiffs-appellees the costs on appeal, to be taxed by the Clerk of this Court.

July 29, 1988

ISSUED AS MANDATE: August 22, 1988

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. A-86-CA-569

MISSOURI PACIFIC RAILROAD COMPANY, ET AL.

versus

RAILROAD COMMISSION OF TEXAS, ET AL.

JUDGMENT

Pursuant to the Memorandum Opinion and order entered in the above-styled case this date, the Court finds that the United States of America, acting through the Federal Railroad Administration and by the FRSA has addressed the field of cabooses on trains. Accordingly, any state action in those areas is preempted unless it meets the three-part test of 45 U.S.C. § 434. In this case, the subject rule, 16 TEX. ADMIN. CODE § 5.622, does not meet that test, and therefore it is preempted.

In addition, the Court finds that the United States of America, acting through the Federal Railroad Administration and the Material Transportation Bureau, and by the FRSA, the LBIA and the HMTA, has wholly preempted and

occupied the subject matter of locomotive equipment, and has addressed the subject matter of flag protection, dragging equipment detectors, telemetry devices, and the need for special equipment on hazardous materials trains. Accordingly, any state action in the area of locomotive equipment is preempted, and specifically, 16 TEX. ADMIN. CODE § 5.622(b), (d)(2), (4) and (5) are preempted. Further, any state action in the areas of flag protection, dragging equipment detectors, telemetry devices, and hazardous materials equipment is preempted unless it meets the three-part test of 45 U.S.C. § 434. In this case, the relevant portions of the rule fail the test, and thus 16 TEX. ADMIN. CODE § 5.622(d)(1), and (4), and that part of (d)(2) concerning dragging equipment are preempted, as are the rule's requirements concerning hazardous materials. In addition, those provisions concerning hazardous materials are inconsistent with the HMTA, and preempted under 49 U.S.C. § 1811(a). Moreover, because these preempted provisions are not severable from the remainder of the rule, the entire rule must fail.

ACCORDINGLY, IT IS ORDERED that 16 TEX. ADMIN. CODE § 5.622 IS VOID AS FEDERALLY PREEMPTED, AND THE DEFENDANT IS PERMANENTLY ENJOINED FROM ENFORCING SAID RULE.

SIGNED and ENTERED this 8th day of May, 1987.

/s/ JAMES R. NOWLIN
UNITED STATES
DISTRICT JUDGE

APPENDIX F

(Background Statement Only)

Department of Transportation

Federal Railroad Administration

49 C.F.R. Part 232

[Docket No. PB-7, Notice No. 3]

Railroad Power Brakes and Drawbars

Agency: Federal Railroad Administration

[FRA], Department of Transportation [DOT]

Action: Final Rule

SUMMARY:

This notice amends FRA's power brake rules to permit use of a telemetry device that provides, in the cab of controlling locomotive, a continuous readout of the brake pipe pressure at the rear car of a train, as an alternative to reliance on a gauge at the end of the train and visual observation of the application and release of the brakes on the rear car during intermediate terminal air brake tests. This action is in responses to a petition for rulemaking submitted by the Association of American Railroads [AAR].

Effective date: June 15, 1986.

For further information, contact: *Principal Program Person:* Philip Olekszyk, Office of Safety, Federal Railroad Administration, Washington, D.C. 20590. Telephone 202-426-0897.

Principal Attorney: Michael E. Chase, Office of Chief, Counsel, Federal Railroad Administration, Washington, d.c. 20590. Telephone 202-426-0897.

SUPPLEMENTARY INFORMATION;

Background:

One June 5, 1984, FRA conducted a Safety Inquiry hearing to explore the safety implications inherent in sanctioning the use of radio telemetry devices, in lieu of a gauge and visual observation, to convey information about the functioning of a train's air brake system. The Safety Inquiry was prompted by the FRA's interest in determining whether the devices could enhance the safety of train operations by providing the crew with continuing information on the status of train's air brake system. It was also responsive to AAR petition for rulemaking to address the use of radio telemetry devices (also known as end-of-train devices). As a result of the information obtained at that inquiry and operational data obtained from an extensive field test program of radio telemetry devices, FRA issued a notice of proposed rulemaking on September 3, 1985 (50 FR 35640) to amend FRA's power brake regulations at 49 C.F.R. apart 232.

In summary, the changes proposed in the NPRM were designed to permit the optional use of a device at the rear of a train for compliance with certain test procedures in § 232.13. The device would monitor the brake pipe pressure at the rear of the train and convey that information to the cab of the locomotive controlling the train. Thus,

where the current rule required the manual use of a gauge at the rear of the train to ascertain brake pipe pressure, the device could be used instead. Similarly, where the current rule required a visual determination of the application and release of the brakes on the rear car, the device could be used instead to read the decrease and increase in brake pipe pressure resulting from a train crew member's applying and releasing the brakes by operating the valve on the locomotive. This decrease and increase could be used to determine the application an release of the brakes on the rear car.

A public hearing on the proposed rule was held on October 25, 1985. The hearing was well attended. Commenters at the hearing included three manufacturers of end-of-train devices, six major railroads, the AAR, several national rail labor organizations and six individual railroad employees. Additional written comments to the docket were received from individuals, railroads, state level rail labor groups, and the State Corporation Commission of New Mexico. General comments about the proposed rule are discussed in this portion of the preamble, while comments addressing the specific provisions of the rule language are addressed in the section-by-section analysis.

The proposed rule was supported by most commenters. Manufacturers of end-of-train devices, the AAR, and the railroad commenters strongly supported the use of end-of-train devices. the extensive test program of various devices by several railroads under waiver from FRA was cited. Over 90,000 conductor trips have demonstrated the high reliability of these devices, in excess of 98 percent. The maturity of the technology and engineering of the devices was stressed by the manufacturers. The AAR, in particular, stressed that the enroute failure of a device does not pose any safety problem since a visual observation of the

set and release of the brakes on the rear car is an acceptable method of assuring brake pipe continuity.

FRA agrees with these commenters that the waiver program involving end-of-train devices proved the high level of reliability of the pressure transducer and the telemetry system. FRA also agrees that train line continuity, the critical safety issue addressed in the rear car set and release requirement, is fully demonstrated by use of an end-of-train device. However, FRA has also concluded that these devices offer safety benefits during train operations that go beyond simple compliance with air brake test requirements. A device provides the engineer with a brake pipe "image" at the initial terminal test, including leakage and gradient, which can be used for comparison purposes to assess the train's air brake system throughout the trip. It also aids the engineer when utilizing the brakes for train handling since the engineer will know with certainty when a brake application (pressure reduction) or brake release (pressure increase) signal has reached the rear of the train.

One railroad, the Long Island Railroad, requested that the final rule include its sophisticated brake indicator system used on certain newer passenger equipment, even though the system is not a radio telemetry system. FRA has not included that system in the final rule because it is used on only a very small fleet. FRA believes that the effectiveness of the brake indicator system" can be more fully and efficiently explored through the waiver process.

Rail labor organizations and individual railroad employees generally opposed the rule. The thrust of their objections, however, dealt with the presence or absence of a caboose at the end of a train, not the device itself or whether the device can effectively ascertain brake pipe continuity. Most of these commenters recognized, explicitly is

implicitly, that radio telemetry or end-of-train devices have a future in railroading.

The major objection raised by commentors opposed to the proposed ruled was the opinion that elimination of a caboose from the end of a train adversely affects safety. For example, the comments of the Railway Labor Executives' Association and the United Transportation Union called for new requirements, e.g. overheated bearing/wheel detectors, train length restrictions, and dragging equipment detectors, to counteract the perceived safety detriment of cabooseless trains. FRA does not agree with line of analysis. First, nothin in any current FRA regulation requires a caboose on any train, nor does anything in the final rule issued in this docket authorize the removal of a caboose. The determination on whether a railroad uses a caboose on any given line is made through the collective bargaining process. Moreover, the FRA does not consider the lack of a caboose to be a safety issue per se. While this final rule may facilitate railroad's obtaining economic benefits from cabooseless operations, it does not in any way determine whether a caboose will or will not be used.

Several commenters suggested that FRA require that end-of-train devices be capable of initiating an emergency brake application. After careful consideration, FRA has concluded that such a requirement is unwarranted. First, cabooseless trains operated currently without an end-of-train device lack any ability to initiate an emergency brake application from the rear of the train. Those operations have not demonstrated a need to be able to do so. Second, FRA notes that currently available devices generally do not incorporate this feature and that development work remains to be done before a reliable system is available. Third, this feature would require two-way signal transmission, sharply escalating the cost of the device. However, FRA intends to

monitor the development and impact of end-of-train devices as time goes on.

Several commenters addressed the problems of rear markers on trains, e.g., light color. Most of these comments are unrelated to this rulemaking, and undoubtedly were submitted because many end-of-train devices are combined rear marker and rear car brake pipe pressure telemetry systems. For example several labor organizations commented that the telemetry system should be capable of providing information regarding the status of the rear marker light, including the level of battery reserve. FRA views these types of comments as reflective of the tremendous potential of end-of-train devices to provided the engineer with information about the train. FRA expects significant developments in the capabilities and features of these devices. However, FRA has concluded that it is both premature and unwarranted from a safety standpoint to mandate these optional features.

APPENDIX G

§ 434. National uniformity of laws, rules, regulations, orders and standards relating to railroad safety; State regulation

The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

Supreme Court, U.S.
FILED
NOV 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-789

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

RAILROAD COMMISSION OF TEXAS, *et al.*,
Petitioners,

v.

MISSOURI PACIFIC RAILROAD COMPANY, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS MISSOURI PACIFIC RAILROAD COMPANY, *et al.* IN OPPOSITION

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Date: November 23, 1988

QUESTIONS PRESENTED

1. Whether the Fifth Circuit erred in holding that implied preemption of a state regulatory agency rule is permissible under the Federal Railroad Safety Act.

2. Whether, under the Federal Railroad Safety Act and its attendant regulations, 16 T.A.C. §5.622 is impliedly preempted.

Respondents do not ignore petitioners' first Question Presented, but for reasons explained at page 12 herein believe only those two questions listed above are pertinent.

LIST OF PARTIES

Petitioners:

Railroad Commission of Texas

Its Members: James E. Nugent
Kent Hance
John Sharp

Respondents:

Missouri Pacific Railroad Company

Missouri Pacific Railroad Company is a subsidiary of Union Pacific Corporation. Other subsidiaries of Union Pacific Corporation are Union Pacific Railroad Company, Union Pacific Resources Company and Union Pacific Realty Company.

Southern Pacific Transportation Company

Southern Pacific Transportation Company is owned by S.P.T.C. Holding, Inc., a wholly owned subsidiary of Rio Grande Industries, Inc.

St. Louis Southwestern Railway Company is controlled by Southern Pacific Transportation Company.

The Atchison, Topeka and Santa Fe Railway Company

The Atchison, Topeka and Santa Fe Railway Company is a subsidiary of Santa Fe Industries, Inc. Santa Fe Industries, Inc. is a subsidiary of Santa Fe Southern Pacific Corporation. Publicly-traded affiliates of The Atchison, Topeka and Santa Fe Railway Company are Santa Fe Natural Resources, Inc. and Santa Fe Energy Partners, L.P.

Burlington Northern Railroad Company

Burlington Northern Railroad Company is a subsidiary of Burlington Northern Inc.

Missouri-Kansas-Texas Railroad Company

Missouri-Kansas-Texas Railroad Company is a subsidiary of Missouri Pacific Railroad Company.

Kansas City Southern Railway Company

Kansas City Southern Railway Company is a subsidiary of Kansas City Southern Industries, Inc. Louisiana and Arkansas Railway Company is a subsidiary of Kansas City Southern Railway Company. Kansas City Southern Industries, Inc. owns a majority interest in DST Systems, Inc.

Louisiana and Arkansas Railway Company

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STATEMENT OF THE CASE

By June 16, 1986 action, the Railroad Commission of Texas and its members (hereinafter "Commission" or "petitioners") adopted 16 T.A.C. §5.622, a rail regulation in its original form proposed by the United Transportation Union which mandates use of cabooses on most trains in Texas unless certain train and track equipment is utilized and which also requires a caboose escort for the transportation of certain hazardous materials. By Complaint filed in the United States District Court for the Western District of Texas, Austin Division, on October 17, 1986, the railroads noted by three distinct causes of action that the Commission rule was preempted by different federal laws and their attendant regulations, by a fourth cause of action that the Commission rule created an unconstitutional burden on interstate commerce, by a fifth cause of action that the Commission rule created an unconstitutional impairment of contract rights, by a sixth cause of action that the Commission rule was an unlawful exercise of power by the petitioners and by a seventh cause of action that the Commission action was arbitrary, capricious and unsupported by substantial evidence. The railroads moved for a Preliminary Injunction on the basis of the first three causes of action entailing various preemption grounds under differing federal laws and regulations. The Commission moved to consolidate the Preliminary Injunction hearing with a trial on the merits, which was done. The trial court entered its final judgment on the basis of all three causes concerning preemption by various federal statutes and their attendant regulations, without reaching the remaining four causes of action. The United States Court of Appeals for the Fifth Circuit affirmed the trial court on the basis only of one of the causes of action regarding preemption, specifically, that the Commission rule was federally preempted by the Federal Railroad Safety Act and its attendant regulations. The two remaining preemption grounds of the district court decision were not reached by the appellate court, as necessarily were not the four non-preemption causes of action alleged in the Original Complaint.

SUMMARY OF ARGUMENT

The Commission's assertions notwithstanding, there is no reason to grant Writ of Certiorari in this case. The Fifth Circuit decision is not in conflict with any decision of a federal court on the same matter. The decision is not a departure from the accepted and usual course of judicial proceedings, but rather is simply another affirmation of the preemptive nature of a pervasive, federal regulatory scheme. No reason exists to suspect that federal regulatory control of rail safety, one of the most extensive federal regulatory regimes existent, in some way is immune from the federal common law of implied preemption. It is clear that the Federal Railroad Administration has addressed the caboose issue by saying that it is not even a safety matter *per se*, hence a subject matter over which the Federal Railroad Administration chooses not to extend its regulatory jurisdiction, and that the caboose issue is adequately addressed by the collective bargaining process.

ARGUMENT

1. Whether the Fifth Circuit erred in holding that implied preemption of a state regulatory agency rule is permissible under the Federal Railroad Safety Act.

Petitioners suggest that because the Federal Railroad Safety Act has an express preemption provision, somehow the federal common law of implied preemption is inapplicable. Petitioners cite no cases to this effect. Not only did the Fifth Circuit opinion adequately address petitioners' concern by a proper analysis of the pertinent federal authorities and the legislative history of the Federal Railroad Safety Act, but a long line of consistent federal case law authority stands for the proposition that implied preemption of state regulatory activity is appropriate when the regulatory subject matter is one of dominant federal concern, when there exists a pervasive federal regulatory regime or when the state regulation stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

To begin, the Fifth Circuit (850 F.2d at 266, Petitioners' Appendix at 4a) analyzed the preemptive provision of the Federal

Railroad Safety Act to determine Congressional intent in light of the Act's legislative history, the attendant federal rail safety regulations and the eighteen year history of federal regulatory control over the railroad industry pursuant to the Act. Since its enactment, a feature of the Federal Railroad Safety Act has been that the regulations relating to railroad safety shall be nationally uniform to the extent practicable. A state may adopt or continue in force a law, rule, regulation, order or standard covering a rail safety matter which the Secretary of Transportation has addressed only: (1) when necessary to eliminate or reduce an essentially local safety hazard; (2) when not incompatible with any federal provision; and (3) when not creating an undue burden on interstate commerce. All three prongs must be satisfied. Congressional intent to preempt most state regulation except under very narrow circumstances is made crystal clear in the Congressional deliberations prior to the enactment of the Federal Railroad Safety Act.

The House Report accompanying the draft bill articulates the intent to establish uniform national standards:

> With the exceptions of industrial or plant railroads, the railroad industry has very few local characteristics. Rather, in terms of its operations, it has a truly interstate character calling for a uniform body of regulation and enforcement. It is a national system....the integral operating parts of these companies cross many State lines. In addition to the obvious areas of rolling stock and employees, such elements as operating rules, signal systems, power supply systems, and communication systems of a single company normally cross numerous State lines. To subject a carrier to enforcement before a number of different State administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.
>
> 1970 U. S. Code Cong. and Admin. News, 91st Cong. 2nd Sess. 4104, 4110-11.

In the House of Representatives' discussion before the House vote on the Federal Railroad Safety Act, Representative Jake Pickle explained Congress' intent to narrowly limit state action:

> Perhaps the most beneficial aspect of this legislation is that, unlike the Senate version, this bill precludes the possibility of 50 different sets of safety regulations for 50 different states. We take away the potential for patchwork and jig-saw puzzles in the area of railroad safety.
>
> 116 Cong. Rec. 27613 (August 6, 1970).

The very text of the bill itself, together with those legislative history excerpts presented, evince the Congressional intent that the Federal Railroad Safety Act and regulations promulgated thereunder supersede the exercise of state authority except in very narrow circumstances. When Congress has manifested its intent clearly, there is no presumption against preemption of state safety regulations. *See, e.g., National Association of Regulatory Utilities Commissioners v. Coleman*, 542 F.2d 13 (3d Cir. 1976); *Lockheed Air Terminal, Inc. v. City of Burbank*, 457 F.2d 667, 671 (9th Cir. 1972), *aff'd*, 411 U.S. 624 (1973).

When courts have been faced with the task of discerning the Congressional intent of 45 U.S.C. §434 *vis-a-vis* preemption, they have read it to provide a narrow exception to federal preemption of state regulation. In *Atchison, Topeka and Santa Fe Railway Co. v. Illinois Commerce Commission*, 453 F.Supp. 920 (N.D. Ill. 1977) (hereafter *ATS&F v. ICC*), the Court considered a state order which required special handling of 130 commodities in addition to those commodities federal regulations already required to be specially handled. In addressing the preemption standard of 45 U.S.C. §434, the Court held that the standard ought be read to broadly preempt state regulation:

> Although the court has found no reported decision which addresses the precise problems raised by this case, those which have dealt with the Railroad Safety Act are uniform in their finding of Congressional intent to preempt most state regula-

> tion relating to railroad safety. Commenting on §434, which is quoted above, the Third Circuit said, "We believe these statutory provisions evince, as the district court determined, 'a total preemptive intent.'" Similarly, the Fifth Circuit has noted, "The meaning of the Congressional declaration is clear. The ultimate goal of the Act is to establish nationally uniform control of railroad safety..."
>
> *ATS&F v. ICC* at 925 (quoting *National Association of Regulatory Utility Commissioners v. Coleman*, 542 F.2d 11, 13 (3d Cir. 1976) and *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108, 1112 (5th Cir.), *cert. denied*, 414 U.S. 855 (1973) (emphasis added).

The Fifth Circuit, in a case in which this Court denied a petition for certiorari, had already assessed Congressional intent regarding preemption of state regulation of rail safety matters. In *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108 (5th Cir.), *cert. denied*, 414 U.S. 855 (1973), the Fifth Circuit considered a Louisiana parish's attempt to regulate allegedly dangerous conditions of railroad tracks, roadbeds and other facilities. The Fifth Circuit held:

> The meaning of the Congressional declaration is clear. The ultimate goal of the Act is to establish nationally uniform control of railroad safety, but the statute is not ironclad. The Act specifically authorizes a *narrow spectrum* of deviation from national uniformity, and the issue here is whether appellants' state court suit falls within one of the permissible exceptions.
>
> *Id.* at 1112 (emphasis added).

For the purposes of general preemption analysis, it is clear that the Fifth Circuit had already ruled that only a narrow exception exists to federal preemption in rail safety matters. In short, 45 U.S.C. §434 generally only allows a narrow exception to fed-

eral control of railroad safety matters, preempting most state regulation.

Against this backdrop of the Federal Railroad Safety Act's legislative history and judicial treatment, the Fifth Circuit in this case addressed the Commission's concern that, since the language of the Federal Railroad Safety Act provided some role for state regulation, implied preemption was inappropriate. At least since the *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978) decision (hereinafter *Ray*), the federal common law of implied preemption has been clear. As stated in *Ray* and noted by the Fifth Circuit in the underlying decision in this case, one of the legitimate questions in a preemption inquiry is whether Congress has either explicitly or implicitly declared that the states are prohibited from regulating a given area. As stated in the *Ray* decision, quoting from numerous United States Supreme Court precedents, Congressional preemptive purpose may be evidenced by a federal regulatory scheme so pervasive as to make reasonable the inference that Congress left no room for states to supplement the regulatory area, or the act of Congress may concern a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws, or the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the federal dominance in the field. Even if Congress has not completely foreclosed state legislation of a particular area, state regulation is void to the extent it conflicts with federal regulatory control. A conflict will be found where compliance with both is a physical impossibility or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

All of the above statements are lifted directly from the *Ray* decision (435 U.S. at 157-158), wherein United States Supreme Court precedent is given for each statement. In short, there is a common law of implied preemption which may exist in conjunction with an express preemption provision in a statute. As is clear from the extent of the federal dominance over the railroad industry and the very nature of rail transportation as inherently interstate, and as made clear in case law cited earlier discussing Congressional intent in the enactment of the Federal Railroad Safety Act

and the legislative history of the statute itself in those excerpts provided, there is nothing logically inconsistent with the notion of implied preemption in connection with the Federal Railroad Safety Act. Indeed, the *Ray* case, which unambiguously defines the notion of implied preemption, itself concerned a federal law containing an express preemption provision. No subsequent case considering the *Ray* decision has altered the federal common law that creates implied preemption of state regulatory activity under certain circumstances[1]; certainly the petitioners have failed to cite any decision even suggesting that rail safety regulation, a matter inherently federal in nature, is exempt from federal common law.

2. Whether, under the Federal Railroad Safety Act and its attendant regulations, 16 T.A.C. §5.622 is impliedly preempted.

Given that implied preemption of a state regulatory agency rule is permissible under the Federal Railroad Safety Act, the question becomes whether 16 T.A.C. §5.622 is preempted by Federal Railroad Administration action – in terms of the statute, has the Federal Railroad Administration covered the subject matter of cabooses. The Fifth Circuit had occasion to discuss the meaning of this statutory language in recent litigation between these parties. *See, Missouri Pacific Railroad Co., et al. v. Railroad Commission of Texas,* 833 F.2d 570 (5th Cir. 1988). While the Fifth Circuit in this earlier decision was concerned with a different Commission rule, the analysis of implied preemption is both apt and consistent with *Ray*, and was utilized by the Fifth Circuit in the instant case.

The Fifth Circuit held that "covering the subject matter" has a practical as well as a policy dimension under the Federal Railroad Safety Act. The Fifth Circuit analyzed the *Ray* principle

[1] For example, the Commission cites the 1986 decision *Louisiana Public Service Commission v. Federal Communications Commission,* 476 U.S. 355 (1986) for the argument that implied preemption is improper. Yet the text of this case directly confirms the notion that state regulation will generally be displaced to the extent that it stands as an obstacle to the accomplishment of Congressional intent, *id.* at 368-69. The Congressional intent with the Communications Act of 1934, however, was to leave to the exclusive control of states all intrastate wire and radio communication, i.e., the statute contained an express prohibition against federal preemption of the pertinent subject matter, quite differently than in the instant case.

that where failure of federal officials to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute, states are not permitted to use their police power to enact such regulation. It rephrased the federal test as: If the policy maker has looked at the matter and decided that it is appropriate to do nothing, then there is an implied preemption against the state enacting such regulations. This is much the same test stated in *Ray* as whether the Secretary "has addressed" the subject matter of the challenged regulation.

The Federal Railroad Administration, in the context of a rulemaking procedure, has already considered whether train operation safety requires a caboose. The Federal Railroad Administration failed to adopt such a requirement, expressly stating that the caboose is not even a safety issue.

As outlined above, Congress, in enacting the provisions found at 45 U.S.C. §434, intended to preempt the field of rail safety standards, permitting state regulation in such areas only within the narrowly expressed exceptions to such preemption. By Commission argument, the adopted rule was designed as a railroad safety measure requiring utilization of cabooses, by its terms applicable to essentially all freight trains operated within the state of Texas. It has therefore been preempted by federal railroad safety standards if the Secretary of the Department of Transportation, or his designee, the Administrator of the Federal Railroad Administration, has adopted a standard "covering the subject matter" of the occupied caboose law within the meaning of 45 U.S.C. §434.

There is no federal statute or regulation which affirmatively requires that the last car of a freight train be an occupied caboose. However, there are regulations adopted by the Administrator of the Federal Railroad Administration which contemplate and facilitate the operation of freight trains without occupied cabooses.

Effective June 15, 1986, the Administrator of the Federal Railroad Administration, Department of Transportation, amended regulations found at 49 C.F.R. part 232 relating to railroad power brakes and draw bars. *See*, 51 Fed. Reg. 17300 *et seq*. Effective August 11, 1986, the Administrator amended regulations found at 49 C.F.R. parts 218 and 221 regarding rear-end marking devices

on passenger, commuter and freight trains. *See,* 51 Fed. Reg. 25180 *et seq.* Both amendments were promulgated to accommodate and facilitate the operation of freight trains without cabooses. In taking these actions in the summer of 1986, the Federal Railroad Administration has "covered the subject matter" of the subject state rule within the meaning of 45 U.S.C. §434, and has therefore preempted any state law requiring the use of occupied cabooses on a statewide basis. Under the Supremacy Clause and the express provisions of the Federal Railroad Safety Act, the Commission's occupied caboose rule is unenforceable as a matter of law.

Public hearings on these two sets of regulations were held during the last week of October 1985. *See,* 51 Fed. Reg. at 17300 and at 25180. As was noted in the background explanation set forth at 51 Fed. Reg. 17300-17301:

> Rail labor organizations and individual railroad employees generally opposed the rule [amending the power brake requirements]. The thrust of their objections...dealt with the presence or absence of a caboose at the end of a train...The major objection raised by commentators opposed to the proposed rule was the opinion that the elimination of a caboose from the end of a train adversely affects safety. For example, the comments of the Railway Labor Executives' Association and the United Transportation Union called for new requirements, e.g., overheated bearing/wheel detectors, train length restrictions, and dragging equipment detectors, to counteract the perceived safety detriment of cabooseless trains. FRA does not agree with this line of analysis. First, nothing in any current FRA regulation requires a caboose on any train, nor does anything in the final rule issued in this docket authorize the removal of a caboose. The determination on whether a railroad uses a caboose on any given line is made through the collective bargaining process. Moreover, the FRA does not consider the lack of a caboose to be a

> safety issue per se. While this final rule may facilitate railroads' obtaining economic benefits from cabooseless operations, it does not in any way determine whether a caboose will or will not be used.

As evident from the excerpt, the Federal Railroad Administration considered comments from various groups including the United Transportation Union (the proponent of the original Texas caboose rule) suggesting use of various track/train equipment with cabooseless operations (essentially the Texas caboose rule). The Federal Railroad Administration expressly rejected those comments by stating that not only was the caboose issue one over which it affirmatively chose to not exercise its safety jurisdiction, but also that the issue was adequately addressed by collective bargaining processes. In amending the power brake rules to facilitate cabooseless operations, the Federal Railroad Administration explicitly set forth its standard of not expressly adopting any caboose requirement.

The determination of the Federal Railroad Administration that it would not "require a caboose on any train, nor...authorize the removal of a caboose" but rather would leave the issue to the collective bargaining process must be viewed in light of its statutory mandate to "prescribe, as necessary, appropriate values...and standards for all areas of railroad safety." 49 C.F.R. 1.49(n); 49 C.F.R. §209.1. The federal agency had previously announced its intent to retain and to exercise exclusive jurisdiction to regulate the safety of railroad operations. 43 Fed. Reg. 10583, 10585. The agency delineated its activities as follows:

> The overall FRA program to assure the safety of railroad operations may be generally subdivided into three fields: (1) Track, roadbed, and associated devices and structures, (2) equipment, and (3) human factors. FRA has now exercised its statutory authority with respect to each of these regulatory fields by actual rulemaking. While it is expected that additional regulatory initiatives may be undertaken, as necessary, in each of the major

> regulatory fields, it is the judgment of the agency that piecemeal regulation of individual hazards in any of the three regulatory fields by any other agency of government would be disruptive and contrary to the public interest.
>
> 43 Fed. Reg. at 10586.

The Federal Railroad Administration concluded that it "does not consider the lack of a caboose to be a safety issue *per se*," and therefore elected not to utilize its safety regulatory authority to address cabooses.[2] Under well-established principles of federal preemption, a federal decision **not** to regulate has the same preemptive effect as a decision to regulate. The Supreme Court articulated this principle in *Arkansas Electric Co-Op. Corp. v. Arkansas Public Service Commission*, 461 U.S. 375, 384 (1983):

> [A] federal decision to forego regulation in a given area may imply an authoritative federal determination that the area is best left **un**regulated, and in that event would have as much preemptive force as a decision to regulate.
>
> (Emphasis in original.)

When the Federal Railroad Administration concluded in 1986 that it would not require the use of cabooses on freight trains, it affirmatively decided that the "caboose issue" was not within the ambit of safety regulations that the Federal Railroad Administration would adopt. The Federal Railroad Administration made these decisions in its adoption of regulations which facilitate cabooseless operations. It would frustrate Congressional intent and be abortive of existing federal regulations to allow a state to mandate cabooses while the Federal Railroad Administration is assisting in the expansion of cabooseless operations.

[2] Petitioners appear to concede at pages 8-9 of their Petition that the state rule was adopted because of their difference of opinion with the Federal Railroad Administration about whether the caboose issue is a safety matter.

Commission's "Private Agreement" Issue
(Germane to Commission's First 'Question Presented')

The Commission makes much ado about nothing in its argument that the Fifth Circuit decision in some way sets the dangerous precedent that private agreements may override governmental regulation of a rail safety issue. The railroads note emphatically that no such issue was ever present in this case at any level; it is stressed now by the Commission only to making enticing the Petition.

The only issue decided by the Fifth Circuit was whether 16 T.A.C. §5.622 was impliedly preempted by the Federal Railroad Administration having addressed the subject matter. Discussion of collective bargaining processes[3] arose only because when the Federal Railroad Administration affirmatively chose not to exercise its regulatory authority over the caboose issue, it noted incidentally that the matter was not a safety issue anyway but rather a collective bargaining issue.

The Commission cites *Terminal Railroad Association of St. Louis v. Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1943), as supportive of two additional propositions – that a state may require cabooses by its police power and that a caboose requirement is not unduly burdensome. Concerning the first proposition, the Fifth Circuit adequately distinguished this 1943 decision by noting that it was decided twenty-seven years prior to enactment of the Federal Railroad Safety Act, the preemptive effect of which is at issue, and that safety considerations are far different now. The second proposition is concededly not at issue (*Petition* at 16).

[3] Wherein incidentally both in 1982 and 1985 the United Transportation Union agreed with railroad management to expanded cabooseless operations nationwide.

CONCLUSION

Implied preemption of state regulatory action is appropriate when the state action conflicts with federal superintendence of the regulatory field by standing as an obstacle to the accomplishment and execution of the full purposes and objective of Congress or by frustrating federal regulations controlling the field. With the Federal Railroad Safety Act, an almost total preemptive intent has been expressed through the Act, its legislative history, its court interpretations and the eighteen year span of its regulatory regime. Essentially, states may regulate local safety hazards, i.e., particular, localized conditions not caught by the federal net. Regarding the caboose issue, the Federal Railroad Administration has adopted safety regulations specifically designed to facilitate cabooseless operations. While so doing, the Federal Railroad Administration affirmatively asserted, after considering the safety arguments for and against caboose use, that it would forego express regulation thereover, i.e., that the area is best left unregulated by rail safety administrators and left to the collective bargaining processes.

Respectfully submitted,

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